TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 127.

JOSE ELIAS SANTIAGO AND ANA MATILDE GONZALES, PLAINTIFFS IN ERROR,

vs.

ANTONIO PONS NOGUERAS, JUAN PONS COLON, AND AMADOR PONS COLON, DOING BUSINESS UNDER THE NAME OF PONS & COMPANY, AND THE AMERICAN COLONIAL BANK.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED JULY 10, 1903.

(20,786.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1908.

1 In the District Court of the United States for Porto Rico, Sitting at San Juan.

At a stated term of the District Court of the United States for Porto Rico begun and holden at the city of San Juan, in said District, on the eighth day of October, in the year of our Lord one thousand nine hundred and six, and in the one hundred and thirty-first year of the Independence of the United States of America—present, the Honorable Bernard S. Rodey, Judge—among the proceedings had was the rendition of a judgment of dismissal on the 27th day of March, 1907, in the following cause, to wit:

José Elias Santiago, and Ana Matilde Gonzalez, His Wife,
vs.
Antonio Pons Nogueras, Juan Pons Colon, and Amador Pons Colon, Doing Business under the Name of Pons & Company, and The American Colonial Bank.

Be it remembered that heretofore, to wit, on November 30th, A. D. 1906, came said plaintiffs by their attorneys, Francis H. Dexter and Henry F. Hord, and filed their complaint, which is as follows, to wit:

Complaint.

Law, No. 428.

José Elias Santiago et al.
vs.
Antonio Pons Nogueras et al.

Action for the Recovery of Real Estate.

I. The above named plaintiffs, José Elias Santiago and Ana Matilde Gonzalez, his wife, by their attorney Francis H.
2 Dexter and Henry F. Hord, allege that they are citizens and residents of Porto Rico; that the defendant Antonio Pons Nogueras is a subject of the King of Spain and a resident of the Balearic Islands, Spain; that defendants Juan Pons Colon and Amador Pons Colon are subjects of the King of Spain and residents of this district, said Antonio Pons Nogueras, Juan Pons Colon and Amador Pons Colon doing business under the name of Pons & Company in the town of Aibonito; and that said American Colonial Bank is a corporation organized and doing business in Porto Rico under the laws of the State of New York, U. S. A.

II. Plaintiffs say that on the 29th day of March, 1900, they were the owners and in possession of the following property, to wit:

(*a*) Three hundred and seventy-nine (379) cuerdas of land in the barrio of Pasto, municipal district of Aibonito, Porto Rico,

bounded on the north by lands of the Succession of Pedro Hernandez, the tenant Avelina Luna, the brook El Pasto and lands of Lorenzo Negrón and José Tabola; on the south by lands of the Sucesión of Gertrudis Gonzalez represented by José Segarra, by the said brook and by lands of Custodia Colon; on the east by other lands of the said Custodia Colon, of Don Iginio Cartegena, Don Guillermo Aponte and Don Vicente Suarez; and on the west by lands of José Toboada and Lauriana Gonzalez.

This property contained a two story house and various improvements and machinery devoted to the cultivation and preparation of coffee and the various fruits of the country.

This property appears now inscribed in the Registry of Property under the following description: bounded on the north by the lands of Florencio Torres, of Don Antonio Pons, formerly
3 Alvarez Nava, of the succession of José Taboada and by the brook El Pasto; on the east by lands formerly belonging to Don Antonio Costa but now belonging to his succession, by lands of Custodia Colón, formerly owned by Vicente Suarez; on the south by lands of the heirs of Joaquin Gonzalez and by lands of Custodia Colon and the brook El Pasto; on the west by lands of the Succession of José Taboada and of Lauriana Gonzalez.

(*b*) Rustic estate of 15 acres situated in the Llano ward of the municipality of Aibonito, equivalent to 5 hectares, 89 areas and 56 centiares, dedicated to coffee, pasture and lesser fruit and containing a one story wooden house. Bounded on the north by the lands of José María Escalera; south by land of Don José Elias Santiago (formerly); east by a creek and on the west by land of Don José Taboada.

III. Plaintiffs for cause of action against defendants say, that on the 29th day of March, 1900, aforesaid, an action was brought in the Provisional Court established by virtue of G. O. No. 88 of the Military Government of Porto Rico, under date of June 27, 1899, against José E. Santiago by one Antonio Alvarez Nava to recover the sum of four thousand eight hundred and two (4,802) pesos thirty one (31) centavos upon a promissory note claimed to be due by the said José Elias Santiago to one Manuel Gil y Sanchez.

The payee, Gil y Sanchez, a citizen of Porto Rico, having died, the said promissory note was assigned by Juana Rivera, his widow, and administratrix, to the said Alvarez Nava, a subject of the King of Spain, for the purpose of bringing the said suit.

4 In the complaint and in the record of the said case it appears that the said Antonio Alvarez Nava, plaintiff, was a subject of the King of Spain and that the defendant José E. Santiago was a citizen and resident of Porto Rico.

The complaint filed in the said Provisional Court was designated a declaration in assumpsit, and the allegations thereof and the subsequent proceedings in the said cause were based upon the theory of the common law action of assumpsit in accordance with the rule adopted by the said Provisional Court, which provided that: "The course of pleadings and actions at law shall be according to the course of the common law."

Upon the filing of the said declaration and a præcipe for summons on the 29th day of March, 1900, a summons was issued to the defendant therein, José E. Santiago, commanding him to appear on the 11th day of April, 1900. Upon the said date, March 29, 1900, a writ of attachment was issued, based upon an affidavit containing the following allegation:

"Affiant believes that defendant intends to and will fraudulently part with or sell his property before judgment can be recovered against him or said action concluded and that said judgment cannot be satisfied out of the property of the said defendant, and plaintiff, through your affiant, prays a writ of attachment, against a sufficient amount of goods and chattels of defendant to cover any judgment which plaintiffs may recover."

Upon April 6th, 1900, it appears by the record of said cause that a copy of said summons was delivered to the wife of the defendant José E. Santiago, at his residence in Aibonito, but was never personally or in any other manner legally served on plaintiff, José E. Santiago, and on the same date the above described property was attached by the Marshal of the said Provisional Court.

The plaintiff José Elias Santiago, did not appear in the said cause personally or by counsel. There was, on the 21st day of April, 1900, entered up by the said Court a pretended judgment in the following form:

Common Law, No. 35.

ANTONIO ALVAREZ NAVA
vs.
JOSÉ E. SANTIAGO.

This cause came on for hearing upon the default heretofore entered in this behalf for want of appearance. Whereupon it is ordered and adjudged by the Court, that Antonio A. Nava, complainant, do have and recover of and from José E. Santiago, defendant, the sum of $2,923.08, together with the costs herein laid out and expended, hereby taxed at the sum of $22.35. For which let execution issue.

San Juan, April 21, 1900.

ROBERT ALEXANDER,
Captain Eleventh Inf., Clerk U. S. Provisional Ct.

The said Provisional Court at the time of said proceedings and of the rendition of the said alleged judgment was composed of one lawyer as Presiding Judge and two officers of the Army of the United States, not learned in the law, as associate judges.

Thereafter, an execution was issued by the District Court of the United States for Porto Rico upon the said judgment of the Provisional Court, and on the 22nd day of December 1900, the property above described was sold by the Marshal of this court at public auction and the same was purchased at said sale by plaintiff, Antonio Alvarez Nava, through his attorney Herbert E. Smith, for the sum

of Five hundred Dollars ($500.00) which was credited upon said judgment.

Thereupon the said 379 cuerda tract was on the first day of May, 1901, transferred by the purchaser at the said sale to defend-
6 ant Antonio Pons Nogueras, who inscribed the same in his name in the Registry of Property and who from that time continued to withhold the said property unlawfully and wrongfully from plaintiffs. On the 23d day of February, 1906, defendant Antonio Pons Nogueras transferred said tract of 379 cuerdas to said firm composed of himself, Juan Pons and Amador Pons Colon.

IV. The said Provisional Court was organized by General Order No. 88 of the Military Government of Porto Rico, June 27, 1899, at a time when a state of peace prevailed in Porto Rico, and after the promulgation of the permanent treaty of peace between the United States and the Kingdom of Spain, on April 10th, 1899.

In and by the said General Order No. 88, it was provided that the judicial power of the said Provisional Court should extend "to all cases which would be properly cognizable by the circuit or district court of the United States under the Constitution and to all common law offences within the restrictions hereinafter specified."

At the time of the promulgation of the said General Order and of the proceedings hereinabove set forth, the ordinary courts of the country established by Spanish law and continued in force by Military Order after the American occupation, were exercising their functions freely and regularly in strict accordance with law.

Plaintiffs say that the said Provisional Court was illegally created and had no jurisdiction or power to try the said case above described nor to render a judgment therein, nor to sell the property of the plaintiffs under execution as above set forth, and in no case to render judgment against plaintiff José E. Santiago without personal
7 service on him, and that all the said proceedings in said court and thereunder including the sale of the said property to the said Alvarez Nava, and by him to all other persons, including the defendants Antonio Pons Nogueras, Juan Pons Colon and Amador Pons Colon, were and are absolutely null and void.

Plaintiffs say that the said proceedings and the said granting of the judgment and the sale thereunder were null and void for the following reasons, among others, to wit:

(1) Because of the illegal constitution of the said Provisional Court and its want of jurisdiction to try any such suit;

(2) Because even if it were a legally constituted court the jurisdiction was limited to the jurisdiction of the circuit and district courts of the United States in civil matters and because of the lack of diversity of citizenship between the parties thereto, it was without jurisdiction over the said parties and the said cause;

(3) Because the said court was without jurisdiction to try the said cause in the manner that it did in absolute disregard of the laws of Porto Rico and the procedure in force at the time;

(4) Because of the illegality of the summons issued and attempted to be served on plaintiff José E. Santiago;

(5) Because of the illegality of the judgment rendered in the

said cause against the plaintiff therein, in that it was entered without giving said plaintiff an opportunity to be heard and did not constitute due proced*d* of law.

Thereafter plaintiff, José Elias Santiago, for the purpose of recovering the said property, sought the jurisdiction of this court, created by the Act of Congress of April 12th, 1900, and, complying with the previous rules of procedure established by this court, said plaintiff filed his Common Law action of ejectment against the defendants Juan Pons Colon and Amador Pons Colon, but not against the said Antonio Pons Nogueras, to recover the possession of the 379 "cuerdas" tract set out and described in clause (*a*) of paragraph II of this complaint but not as to the 15 "cuerdas" tract described in clause (*b*) thereof, basing the said action solely and only
8 upon the ground of the illegal constitution of the said Provisional Court, and in no manner submitting as an issue in said cause, the lack of the jurisdiction of the said court over the said cause or the parties thereto for any other of the reasons set out in this complaint, or the lack of the jurisdiction of the said court over said plaintiff herein (defendant therein) the said José Elias Santiago, by reason of the absence of the diversity of citizenship or of the requisite amount involved or of the absence of legal summons or service on him in said cause necessary to have given the said Provisional Court jurisdiction of the said cause or over the defendant therein, even if the said Court had been legally constituted, nor the absence of the jurisdiction of the said Provisional Court to proceed as it did in said cause without regard to the laws of Porto Rico.

That upon the sole and only issue submitted in the said cause, to wit;—the legality of the constitution of the said Provisional Court, this Court, by peremptory instructions directed the jury to return a verdict in favor of the defendants Juan Pons and Amador Pons but no other issue was submitted to the Court or the jury.

The said judgment was rendered on the 9th day of May, 1903, and contains, after the description of the property the following judgment: "Now therefore, on motion of José R. F. Savage, attorney for the defendants, it is ordered and adjudged that the said plaintiff Elias Santiago take nothing by his suit; and it is further ordered and adjudged that the said defendants do recover against the said plaintiff the sum of —— as costs to be taxed by the Clerk, for which sum let execution issue."

9 V. By reason of the void and illegal judgment so as aforesaid rendered against plaintiff José Elias Santiago by the said Provisional Court and the sale of his property on the execution issued on the said void judgment, plaintiff José Elias Santiago was ejected from the said tract and ousted therefrom and has not since said time been in possession of any part thereof, although he has been during all of said time, and now is, entitled to the possession, use and enjoyment of said premises as the sole owner of the same.

VI. Defendant American Colonial Bank claims a lien upon the said property by reason of a mortgage attempted to be made by its co-defendant herein, the said Antonio Pons Nogueras, Juan Pons

Colon and Amador Pons Colon April 6th, 1906, to secure the payment of the sum of $1500.00.

VII. Plaintiffs allege that the said Antonio Pons Nogueras has been in the sole and exclusive use and possession of the said tract of 379 cuerdas since the first day of May, 1901, aforesaid, and the said defendants Antonio Pons Nogueras, Juan Pons Colon and Amador Pons Colon composing the said firm of Pons & Company have been in the sole and exclusive use and possession of the said tract since the 23d day of February, 1906, and the said defendants are still in the wrongful and unlawful possession of the same excluding plaintiffs therefrom.

VIII. Plaintiffs allege that after the wrongful and unlawful sale of the said tract of 15 cuerdas above described under subdivision (*b*) the same was taken possession of by the defendant Antonio Pons Nogueras, on the 6th day of May, 1901, and the said defendant Antonio Pons Nogueras continued in the sole and exclusive
10 possession thereof until the 23d day of February, 1906, when said defendants Juan Pons Colon and Amador Pons Colon also entered into possession thereof.

Plaintiffs allege that all of the said defendants, to wit: Juan Pons Colon, Antonio Pons Colon and Antonio Pons Nogueras, are in the wrongful and unlawful possession of the said tract and have since and at all times above mentioned and still continue to hold the same wrongfully and unlawfully from plaintiffs.

IX. That there was growing on the said properties at the time plaintiffs were so as aforesaid wrongfully ejected and ousted from the same, and still are a large number of coffee plants and other valuable fruit producing plants, and that the crops produced on the said tracts have amounted during the said time to approximately five thousand dollars, and that all of said crops have been gathered by the said defendants Antonio Pons Nogueras, Juan Pons Colon and Amador Pons Colon, and sold for their own use and benefit.

By reason of the loss of crops, fruit and timber and the income from said property, plaintiffs have been damaged in the sum of ten thousand dollars ($10,000.00) all of which they are entitled to recover from the said defendants Antonio Pons Nogueras, Juan Pons Colon and Amador Pons Colon and from each of them.

Wherefore plaintiffs pray for judgment for the title and possession of the aforesaid property and for their damages against defendants Antonio Pons Nogueras, Juan Pons Colon and Amador Pons Colon and the said American Colonial Bank, and for judgment against the defendants Antonio Pons Nogueras, Juan Pons
11 Colon and Amador Pons Colon in the said sum of Ten Thousand Dollars ($10,000.00) damages and against all of said defendants for their costs in this behalf incurred or expended.

San Juan, Porto Rico, November 30, 1906.

FRANCIS H. DEXTER,
HENRY F. HORD,
Attorneys for Complainants.

Answer of Defendant American Colonial Bank.

(Filed Dec. 10, 1906.)

No. 428. Law.

JOSÉ ELIAS SANTIAGO ET AL.
vs.
ANTONIO PONS NOGUERAS ET AL.

Par. 1. This defendant is unable to admit or deny the allegations of the first paragraph of said complaint, except that this defendant is a corporation organized and existing under the laws of the State of New York, doing business in Porto Rico.

2. This defendant is unable to answer the allegations of the second paragraph of said complaint as to whether or not the plaintiffs were the owners of the land described on the 29th of March, 1900, but defendant says that on the 6th of April, 1906, and prior thereto, the defendant, Pons y Cia. were the owners of said tracts of land and that the same were properly inscribed in their name in the Registry of Property for the district of Guayama.

3. This defendant is unable to admit or deny the allegations of the third paragraph of said complaint.

12 4. Defendant admits that said United States Provisional Court was in existence on the date mentioned in the fourth paragraph of said complaint, but denies the other allegations contained in said paragraph.

5. Defendant denies the allegations of the fifth paragraph of said complaint.

6. Defendant admits the allegations of the sixth paragraph of said complaint.

7. Defendant admits that defendants Pons y Cia. are in possession of said land, but deny that said possession is illegal.

8. Defendant denies the allegations of paragraph eighth of said complaint.

9. As to the allegations of paragraph nine of said complaint, defendant admits that said land was planted in coffee and other fruits, but is unable to admit or deny the value of said crops for the period stated.

For further answer, this defendant says:

That on or about the 6th day of April, 1906, the defendants, Pons & Company, applied to this defendant for a loan of four thousand dollars ($4000.00) and offered in guarantee thereof a mortgage on certain properties owned by them, among which are the properties now the subject of this suit.

Defendant further says that the properties described in the plaintiff's complaint appeared in the Registry of Property for the district of Guayama as belonging in fee to Pons & Company on and before the date of application for said loan, and that against said properties appeared no lien in favor of the defendants or other person. De-

fendant says that on said 6th day of April, 1906, this defendant delivered to Pons & Company the sum of four thousand dollars gold in cash, and the said Pons & Company in guarantee of the re-
13 payment of said loan, executed in favor of this defendant, before the Notary, Gabriel Guerra Acosta of San Juan, on the same date, a first mortgage on the properties described in the complaint, amongst others, and that said properties, under the terms of the mortgage, bore in different proportions and respond for the amount of the mortgage lien on them, all of which is shown by a certified copy of said mortgage instrument hereto annexed, and which this defendant prays may be considered and taken as a part of its answer.

This defendant, further answering, says that its said mortgage was duly recorded in the Registry of Property for the district of Guayama, on the 16th day of April, 1906, as is shown by the certified copy thereof hereto annexed. This defendant further says that said sum of four thousand dollars, with interest thereon, is still due to it and unpaid by the mortgagors, Pons & Company, and said mortgage lien on said properties is still in force and unsatisfied, constituting a first valid lien on said properties described, and this defendant prays that this honorable Court may so declare it, awarding costs in this suit in favor of this defendant.

San Juan, December 10, 1906.

THE AMERICAN COLONIAL BANK, *Defendant,*
By Its Attorney, R. H. TODD.

Demurrer to Complaint.

(Filed Dec. 14, 1906.)

JOSÉ ELIAS SANTIAGO ET AL.
vs.
ANTONIO PONS NOGUERAS ET AL.

Come now the above named defendants, doing business
14 under the name of Pons and Company, by Charles Hartzell and Manuel Rodriguez Serra, their attorneys, and thereupon they demur to the complaint of plaintiffs filed herein and as grounds for said demurrer they allege:

1st. That the said complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them for the following reasons: That it appears on the face of the complaint that the matters and things complained of relate entirely to the proceedings had in the Provisional Court of the United States in Porto Rico, in an action in which the parties hereto or their privies were parties; that no fraud or imposition on the Court or between the parties is alleged with reference to said proceedings, and that in said action a final judgment was duly entered and executed and that no appeal or review was either taken or attempted to be taken with

reference to said judgment, and that the same became and is fixed and binding upon all of the parties thereto and their privies and that the matters and things so adjudicated and determined in said action constitute a bar and *res adjudicata* as to the matters and things set forth in plaintiff's complaint herein.

2nd. That said complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them for the further reason that it appears upon the face of the complaint herein that after the entry and rendition of judgment in the Provisional Court in matters complained of and the execution of said judgment, that the said plaintiffs prosecuted in this Honorable Court their action of ejectment against a portion of the defendants named herein for the recovery of one of the tracts of land described in plaintiff's complaint; that the parties to said action and the parties to the present action are all identical or privy to such parties; that the issue presented to the Court by the said action of ejectment necessarily involved all of the matters and things set forth and complained of in plaintiff's complaint herein; and that a general judgment was rendered in said action of ejectment as appears from the face of the complaint herein ordering and adjudging that the plaintiff take nothing by his said suit in ejectment and that said judgment of this Hon. Court remains and is final, and in full force and effect, and has not been appealed from nor have any steps been taken to review the same. Wherefore it appears on the plaintiff's complaint, that the matters and things therein stated and all of them are *res adjudicata* by reason of the matters alleged.

CHAS. HARTZELL,
M. RODRIGUEZ SERRA,
Attorneys for said Defendants Pons and Company.

Demurrer of Plaintiffs to Answer of Defendant American Colonial Bank.

(Filed Dec. 15, 1906.)

JOSÉ ELIAS SANTIAGO ET AL.
vs.
ANTONIO PONS NOGUERAS ET AL.

The plaintiffs herein by their attorneys Francis H. Dexter and Henry F. Hord, demur to the answer filed herein by the defendant American Colonial Bank for the reason that the matters and things set forth therein are not sufficient to constitute a defense.

Wherefore plaintiffs pray judgment against the defendant American Colonial Bank as requested in their complaint heretofore filed.

December 14th, 1906.

FRANCIS H. DEXTER,
HENRY F. HORD,
Attorneys for Plaintiffs.

Journal Entry.

December 24, 1906.

JOSÉ ELIAS SANTIAGO ET AL.
vs.
ANTONIO PONS NOGUERAS ET AL.

The demurrer of the defendants herein other than the American Colonial Bank having been heretofore set for hearing on this date, come now said defendants by their respective attorneys Chas. Hartzell and M. Rodriguez Serra, and the plaintiffs by their attorneys F. H. Dexter and Henry F. Hord, and after hearing the attorneys for the respective parties the case is submitted on said demurrer, and the parties are given until January 25, 1907, to file briefs.

Journal Entry.

March 27, 1907.

No. 428.

JOSÉ ELIAS SANTIAGO ET AL.
vs.
ANTONIO PONS NOGUERAS ET AL.

The Court hands down an opinion herein and in accordance therewith the demurrer to the complaint is sustained and the case ordered dismissed at the costs of the plaintiffs, to which plaintiffs except.

17 *Opinion.*

(Filed March 27th, 1907.)

No. 428.

JOSÉ ELIAS SANTIAGO and ANA MATILDE GONZALEZ, His Wife, Plaintiffs,

vs.

ANTONIO PONS NOGUERAS, JUAN PONS COLON, and AMADOR PONS COLON, Doing Business under the Name of Pons & Company, and AMERICAN COLONIAL BANK, Defendants.

No. 429.

JOSÉ ELIAS SANTIAGO and ANA MATILDE GONZALEZ, His Wife, Plaintiffs,

vs.

GIL RAMÓN GONZALEZ Y RODRIGUEZ, Defendant.

No. 430.

JOSÉ ELIAS SANTIAGO and ANA MATILDE GONZALEZ, His Wife, Plaintiffs,

vs.

TEODORO MOSCOSO and ALEJANDRINA MORA Y FAJARDO, His Wife, Defendants.

No. 431.

JOSÉ ELIAS SANTIAGO and ANA MATILDE GONZALEZ, His Wife, Plaintiffs,

vs.

ANA SEMIDEY, Widow of Antonio Costa; ANTONIA COSTA Y SEMIDEY, AGUSTIN COSTA Y SEMIDEY, MARIA COSTA DE PASALACUA and JULIO PASALACUA, Her Husband; ANGELA COSTA DE PADILLA and JULIO M. PADILLA, Her Husband, and CARLOTA COSTA DE VIDAL and EDUARDO VIDAL, Her Husband, Defendants.

18 *Opinion Holding United States Provisional Court to Have Been Legally Established by Military Authorities of Porto Rico, and Sustaining a General Demurrer to the Several Declarations Herein.*

These four suits are all brought by the same plaintiffs. The main question to be decided in each of them is the same, therefore they will be considered together.

The issue submitted, which is raised by a general demurrer in each case, brings in question and challenges the legality of the organization, existence and power to act, of the United States Provisional Court of the Department of Porto Rico. It was established

June 27, 1899, by General Order No. 88, promulgated by Brigadier-General Davis, United States Volunteers, who was then Commander of the Military Department here, during the Military Government of the Island.

The declarations in substance state: That plaintiffs are husband and wife, citizens of, and residents in Porto Rico; that on and previous to the 11th day of April, A. D. 1900, they, or at least the husband, were, or was the owner in fee simple, and in possession of several tracts or parcels of land, lots, houses and premises mentioned in the several complaints, amounting in all to an area of about six hundred and fifty cuerdas, situated at, in and near the towns of Aibonito and Guayama in this Island.

That previous to said date, the husband was indebted on his several promis-ory notes, to certain persons or estates, whose names are given, in a total sum of about eight thousand three hundred and fifty pesos of the then current money; that also on or previous
19 to said date, the several holders of these promis-ory notes assigned them to one Antonio Alvarez Nava, a Spanish practicing lawyer here, who, shortly thereafter and on and previous to April 11, 1900, instituted ordinary suits in assumpsit on the same, against these plaintiffs in the United States Provisional Court of the Island. That at the time of, or soon after the filing of said several suits, affidavits for attachment were also filed and writs issued thereon; that service was had, or pretended to be had in each case, either upon the defendant personally, or, as to some of the cases, by leaving a copy of the summons, declaration and writ at the usual place of abode of the defendants (plaintiffs here); and that all of the property described in these complaints was attached in said suits.

That these plaintiffs (defendants in the said suits in the Provisional Court) did not appear on the return days of the several writs; and that thereupon, or soon thereafter, defaults and judgments in each case were taken and entered against them.

That thereafter, on the creation of this present court, and on its coming into possession, under the Act of Congress creating, it, of the records of said Provisional Court, execution was sued out in all of said suits, and levied against the property which had thus been originally attached under the process from the Provisional Court, and all of said property was in due course sold by the marshal of this court, in different parcels, as severally specified, to the predecessors in interest of the defendants mentioned in these present suits, the alleged small amounts received therefor, less costs,
20 being in each case duly credited to the judgment under which the writ issued; and that all of the defendants are now holders of, or have pretended mortgage or other liens upon portions of the said realty, and claim to deraign their several titles or rights thereto, from and under the deeds so made to the several purchasers at such sales.

It appears also that some time after this property was so sold on execution, these plaintiffs brought suits in this court to recover the same from the several persons to whom it had been so sold or afterwards transferred, on the ground that they had been deprived of

their property without due process of law. On May 9, 1903, when one of the suits came on for trial, the then Judge, on a demurrer to the evidence, instructed the jury to find a verdict for the defendants, and thereupon the balance of the cases were by the plaintiffs dismissed without prejudice. It is therefore claimed that the matter is *res adjudicata* as to the defendants mentioned in that particular suit, some or all of whom are now defendants in suit No. 428 here; and it is further contended that the entire subject is *stare decisis* because of the instructions so given by the then Judge to the jury.

It also appears that in three of the cases now being considered, Nos. 429, 430 and 431, there are Porto Ricans as parties plaintiff and defendant and it is argued that because of that fact, under a previous holding of this Court, the jurisdiction is ousted. To this it is replied by counsel for plaintiffs, that the jurisdiction does not depend upon any question of the amount involved, or of diverse citizenship, but involves a question arising under the constitution and laws of the United States and the treaties of the country, and
21 that because of such fact, jurisdiction is inherent here without reference to the amount involved or the citizenship of the parties.

Of course, the point was promptly made in the several demurrers and on the hearing, by the defendants, that these suits are a collateral attack on the judgment of a properly constituted court, and that such procedure is not permissible under the authorities. To which plaintiffs replied that an unauthorized court without legal right of existence is powerless to render any judgment whatever, and that the same can be attacked collaterally or treated as a mere nullity by all persons affected by it, and that the taking of plaintiffs' property in the original suits was a clear violation of the "due process of law" clause of the constitution.

As stated, plaintiffs here, also insist in support of their right to prosecute these actions, that even if it shall be held that said Provisional Court had legal existence and was authorized to act, that still, because it was organized by the general order which created it, manifestly to have such jurisdiction only as is exercised by a circuit or district court of the United States, as to these plaintiffs it had no jurisdiction, for lack of diverse citizenship between the parties, as the plaintiff in all of the original actions was a Spaniard and the defendants, although being native Porto Ricans, were each Spaniards also. Or that perhaps their citizenship was in abeyance under the ninth section of the treaty of Paris, which provides that:

* * * "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."

And further, that it was without jurisdiction because "a citizen of a territory is not a citizen of a State," within the meaning of
22 the Act of Congress fixing jurisdiction of United States Courts, under the rule laid down in Hooe *v.* Jamieson, 166 U. S. 395.

The jurisdiction is also denied because as to some of the cases brought against them in said Provisional Court, the amount involved

was less than the statutory minimum of two thousand dollars. One of the counsel for plaintiffs at the hearing, in answer to the Court's inquiry as to why such an apparently important question as this had not heretofore been in some manner brought before the Supreme Court of the United States, stated that several years ago he had attempted to do so on an application for a writ of *habeas corpus* in *Ex Parte* Baez, 177 U. S. 378, but unfortunately he went out of court on account of the lapse of the sentence of his client, which had converted the proceeding into a moot case, which of course the court very properly refused to entertain, there being no restraint of the appellant's liberty.

Counsel for all parties have exhibited commendable zeal in gathering the authorities bearing on the question to be considered and, in addition to having orally argued with clearness and ability the points contended for, filed briefs in which all the leading authorities are collated and intelligently commented on. Indeed, instances are rare in this court where a great question has been more forcibly presented. Our acknowledgments are cheerfully accorded.

The occurrences surrounding and following the Spanish-American war, created many new situations. Conditions often resulted in unusual but unavoidable executive action. Radically new congressional legislation became necessary, resulting in the grave problems that culminated in the insular decisions,—problems which can hardly be said to be well settled in all their bearings even
23 yet. Indeed, the judicial task of defining the powers of Congress and the Executive, and fixing the rights of the people in our new possessions under our constitution, laws and system of government, has not been an easy one. A judicial guess on a much controverted and close legal proposition, even with an equal chance of being right is never expedient, save perhaps (?) in a court of last resort; hence our task has not been easy.

At the outset, so as to understand the relation of points made, and the force of particular quotations or argument, it may be well to keep in mind a few dates. The peace protocol during the late war between the United States and Spain was signed and actual conflict ceased October 18, 1898; the treaty of peace between the two contending nations was signed at Paris December 10, 1898; the ratifications of the same were exchanged and the treaty proclaimed by the President at Washington on April 11, 1899; the Foraker Act, establishing civil government in Porto Rico, passed Congress April 11, 1900, and took effect nineteen days later, on May 1st of that year.

On April 14, 1899, three days after the ratification of this treaty, the President of the United States, as Commander in Chief of the Army, authorized, as it is claimed, by an "endorsement," the creation of the provisional court in question, by the military authorities of the department of Porto Rico, and the same was established about two and a half months thereafter, on June 27, 1899, by G. O. No. 88 before referred to, at a time, as it is claimed, when all war had ceased and absolute peace prevailed,—but the military authorities were then, and for more than a year thereafter remained, in complete control

of the government of the Island, until the inauguration of
24 civil government under the Foraker Act aforesaid, on May 1, 1900. A copy of this general order is set out in full at the end of this opinion, and a reading of it is necessary to a full understanding of the views herein expressed.

It would not be profitable at this time to refer in detail to all the points and authorities made in the able briefs of both counsel for plaintiffs here, or to follow the references through the text writers and the adjudicated cases to date. It is sufficient to state, as a result of the examination made, that it may be conceded,—perhaps even be laid down as a general proposition, that the President as Commander in Chief of the Army of the United States, ordinarily has no power to establish judicial tribunals in times of peace, over territory of the United States, save perhaps when the same is under military control and Congress has not yet acted to establish civil government therein. But if such tribunals are established during a time of war in territory in charge of the military, the war power of the military branch of the government cannot be questioned. But it would also seem to be pretty well established that such courts may continue thereafter, even though a treaty of peace may be entered into between the belligerents in the meantime, until such time as Congress (which is admit-edly under our system of government in times of peace, vested with sole power in that regard) sees fit to establish a system of civil government in the quieted, ceded or conquered district or country. In fact, this very doctrine is stated in the celebrated case of Cross *et al. v.* Harrison, 16 How. 164, which decision was rendered as long ago as 1853, and has ever since remained the guide-light from which the course of all later decisions appear to have been taken.

It was held in that case that:

25 "The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease as a matter of course, or as a consequence of the restoration of peace; and it was rightfully continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power, to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Four years later, in 1857, the Supreme Court again, in Leitensdorfer *et al. v.* Webb, 20 How. 176, with reference to the action of the military authorities after the conquest in New Mexico, reiterated this same doctrine and held that:

The executive authority of the United States properly established a provisional Government (in New Mexico), which ordained laws and instituted a judicial system; all of which continued in force after the termination of the war, and until modified by the direct legislation of Congress, or by the Territorial Government established by its authority."

And here we might on this matter state that, not only did Gen. Kearney establish provisional courts in New Mexico after the conquest

in August, 1846, and up to the time of the treaty of Guadalupe-Hidalgo in February, 1848, but in addition, he provided for, and there was held, a session of a provisional legislative assembly in 1847, some of the enactments of which are still in force. Moreover, in1848-50, while still under military government, New Mexico held a constitutional convention, erected a full state government and elected a Member of Congress. Its legislature immediately assembled and promptly elected two United States Senators, whose advent in Washington to claim their seats was anticipated by Congress only by a few days in the enactment of the Organic Act creating the jurisdiction into an organized Territory. (See Speeches of the writer of this opinion, advocating the admission of New Mexico and other Territories unto the Union as States, in hearings before the House Committee on Territories, and in Congressional Record of 57th and 58th Congresses.)

26 It will be recalled also that California, while under a military government and long after the date of the treaty of Guadalupe-Hidalgo aforesaid, erected a full State government and was actually admitted to the Union as a State in 1850, without ever having been organized as a Territory at all.

Particular stress, as supporting their side of this controversy, is laid by counsel for plaintiffs here on the decision in the celebrated civil-war-days case of *Ex Parte* Milligan, 4 Wall. 2, which was decided in 1866. We however fail to see its application here, because, instead of referring to conquered territory, it had relation entirely to territory of a State of the Union,—Indiana, where it was sought to try a citizen by a military commission at a time when the courts were open and unobstructed in their functions, and when the federal authority had not been opposed in that State. This is made clear because in the The Grapeshot case, decided in 1869, 9 Wall. 129, it was held that:

When during the late civil war, portions of the insurgent territory were occupied by the National forces, it was within the constitutional authority of the President, as commander-in-chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States, and the Provisional Court of the State of Louisiana, organized under the proclamation of October 20th, 1862, was, therefore, rightfully authorized to exercise such jurisdiction."

In the Riter case, and the Louis case, tried together as No. 16,146, Vol. 27, Fed. Cases (1865), it is stated that at the time of the establishment of the provisional court in Louisiana, a considerable part of that State was held by the forces of the United States, and that in such a case there can be no doubt that the right and duty of such military forces is to furnish a government for the people.

27 And again in 1874, in New Orleans *v.* Steamship Co., 20 Wall. 387, the court sustained a lease made by the mayor of New Orleans, acting under power conferred on him by the military government, although the lease ran for ten years, and within a year after it was made, the government of the city was handed back to the city authorities.

In Mechanics' and Trader's Bank *v.* Union Bank, 22 Wall. 276, it is held that:

"The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts was the exercise of the ordinary rights of conquest.

A court established by proclamation of the commanding General in New Orleans, on the 1st of May, 1862, on the occupation of the city by the government forces, will, in the absence of proof to the contrary, be presumed to have been authorized by the President."

It is argued here that, because this particular provisional court was established after the exchange of ratifications of the treaty of peace, it cannot therefore be claimed to be authorized under the supposed rule that permits existing conditions, as they were when peace was declared, to continue until Congress acts. In reply, defendants here are contending that, although this provisional court was established after the date of the treaty, still it was but an incident in the judicial system of the Island that had been completely overthrown and changed after the date of Gen. Miles' occupation of the Island, on July 25, 1898, and most of which local courts were established even after the provisional court, and that therefore no line of division can be drawn between this provisional court and any of the other or local (Spanish speaking) courts on the Island, because, as stated, all the latter were established or remodeled by general orders of the military governor or commander about a month and a half later than
28 this provisional so-called United States court. In fact, an entirely new local judicial system was created by general order No. 118, on August 16, 1899.

In October, 1899, Hon. Chas. E. Magoon, now provisional Governor under our intervention in Cuba, then law officer of the division of insular affairs of the War Department at Washington, submitted to Hon. Elihu Root, then Secretary of War, several reports which were afterwards compiled and published by the government under the title of "The Law of Civil Government under Military Occupation." We might pause here to say that Governor Magoon has placed all lawyers and courts having questions such as are here involved, to consider, under a lasting obligation for the production of this work. He of course then realized, as did everybody on the Island here and in the nation, the inconvenience and embarrassment that were arising because of the non-action of Congress, and the leaving of Porto Rico and other insular possessions under military control. On page 25 of his work he states:

"There exists an obvious necessity of creating and establishing a permanent civil government in Porto Rico. The authority necessary to be exercised in accomplishing this work is vested in Congress. * * * The creation of a permanent civil government for Porto Rico calls for the exercise of legislative powers; and the Constitution provides that, "All legislative powers herein granted shall be vested in Congress."

Then he proceeds to quote approvingly from the authorities with

reference to the powers of the President of the United States, as follows:

* * * "It, however, is well settled by the Supreme Court, that, as a constitutional commander in chief, he is authorized to form a civil or military government for the conquered territory during the war; and that when such territory is ceded to the United
29 States, as a conquest, the existing government so established does not cease as a matter of course or as a consequence of the restoration of peace, that, on the contrary, such government is rightfully continued after the peace and until Congress legislates otherwise." * * *

Here we pause to remark that we are unable to see why a system of courts for any such conquered or ceded territory is not a necessary part of any such government.

And after reviewing at considerable length certain other lines of authorities, he proceeds on page 30 of his work to state, on his own account, that:

"It is also important to ascertain if the head of the military government of Porto Rico may exercise the powers of the judicial branch of the government. The functions performed by the judiciary are essential to good government, and therefore must be performed in Porto Rico. The jurisdiction to exercise judicial authority in territory to which the sovereignty of the United tSates has attached differs from that of legislation, in that the jurisdiction to legislate is conferred upon Congress by the fact of the sovereignty attaching, while the Federal courts of the United States, being dependent upon Congress for their territorial and other jurisdiction, must await appropriate action by Congress for jurisdiction over newly acquired territory. Meanwhile the necessity for judicial action continues, and the military government is called upon to meet the necessity. Article XLI of the treaty of peace (1898) clearly contemplates that the ordinary course of the prior government will continue in existence and such is the usage of nations. If these courts are found inadequate to deal with the domestic or internal situation arising by reason of the questions involved in the relations sustained by the inhabitants of the island, *inter se*, I am of opinion that the head of the military government of the Island would be authorized to discharge the necessary functions, and to accomplish said purpose may designate instruments therefor, to wit, courts."

And these remarks of Governor Magoon bring to mind the fact, that of necessity the so-called United States Provisional Court in question here, was only a local military court and that it was designated as a "United States" court only as a matter of convenience, and hence the judiciary and practice acts can have no binding force upon it, save in an incidental way.

If we are looking for precedent, it must not be forgotten
30 that our military forces remained in Cuba for a considerable length of time after Spain had relinquished her sovereignty therein, and that our military government established there, exercised practically all powers of government. So too, for a much longer period was this the case after the Philippines had been ceded

to the United States by Spain. It will be recalled that millions of people who live in those islands were for several years, and in fact are to a large extent yet, governed by a commission, and that when Congress, on the 1st of July, 1902, 32 Stats. 691, passed the Act to establish limited civil government in said islands, which perhaps has not even yet been fully established, the first section of the Act at very considerable length, proceeded to ratify the action of the President in creating the Philippine Commission to exercise all the powers of a complete system of government, as he had done, and most of which was done after the date of the treaty of Paris.

Congress evidently deemed the action of the President in the Philippines to have been proper and necessary, and we think the same is true as to Porto Rico; and it also may, we submit, be fairly presumed that Congress ratified the acts of the President under the military government here. His acts have never been disapproved by Congress, although it has had ample opportunity to do so. In fact, it may with force be contended that it has not only recognized, but has, as stated, ratified the creation of this military court, and also of other courts in the Island, because in sections 33 and 34 of the Foraker Act, 31 Stats. 77, it refers to, and by necessary implication validates all the military general orders creating courts, issued during the military occupation of the Island, and most of which
31 general orders as to courts, were, as stated, of date subsequent to the treaty; and further provides (Sec. 34) as to this present court, that:

"The United States District Court hereby established shall be the successor to the United States provisional court established by General Orders, Numbered Eighty-eight, promulgated by Brigadier-General Davis, United States Volunteers, and shall take possession of all records of that court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued."

It will not do to reply to this, that not even Congress by an *ex post facto* law could ratify the act of an unauthorized court that had violated vested property rights, because it must first be shown that the court was unauthorized, and that it was not even a *de facto* court.

It is not at all certain that, even if it could be held that the creation of this provisional court was wholly unauthorized, still it might not be held to be a *de facto* court under the circumstances, the judgments of which would stand as against collateral attack, which is certainly what is being attempted here. Counsel for defendants here in cause 431 has filed a very carefully prepared brief on this phase of the case, which we do not think it necessary to refer to in detail, and in support of which he cites State *v.* Carroll, 38 Conn. 449, which it appears is the leading case on the subject. And shows that this case was approved in a long line of decisions in the Supreme Court of the United States, such as Norton *v.* Shelby County, 118 U. S. 425: *In Re* Manning, 139 U. S. 504; Ball *v.* United States, 140 U. S. 118; McDowell *v.* United States, 159 U. S. 601, and many others, in many of which the facts were such as to lend great force

to his contention that the provisional court in question,
32 even though created after the treaty of peace by a military order under authority of the President of the United States as Commander-in-Chief of the Army, was a *de facto* court.

It will probably be conceded that one of the points decided by the majority opinions in the insular cases, is that the constitution of the United States does not as a whole, of its own force, extend to newly acquired territory, until Congress shall affirmatively so enact; at least this is what we gather from the opinion of Mr. Justice Brown in Rassmussen *v.* United States, 197 U. S. 553.

The conditions in the Island of Porto Rico at the time of the creation of the provisional court were peculiar. The treaty of peace had left the citizenship and status of the inhabitants of the Island "up in the air." Congress had done nothing in the way of establishing a system of civil government, and did not do so for nearly or more than a year thereafter. Of necessity, the military authorities had to supply a government until Congress should act. If this is not so, then the inquiry would naturally arise, what was to happen to the Island during the interim? Can it be said that the President should have at once called Congress in special session to enact laws for the government of the Island? Or that, whenever Congress fails to establish civil government in newly acquired territory after a treaty, that the military authorities must forsooth immediately withdraw, or that if they remain, their powers are restricted to the merest police powers? And that they cannot during such time provide for any new, or make any change in existing tribunals? With all due respect to the eminent authorities that, at least by implication, affirm this doctrine, we believe the contrary rule is now set-
tled. We further believe that, save as to alienating the *the*
33 public domain or affecting the rights of the United States, and perhaps as to some other matters, the military authorities during such interim, not only have power subject to those clauses of the Constitution that restrict all officers of the United States everywhere, but it is their duty to provide a government sufficient for the needs of the people of the conquered or ceded country, until Congress shall act,—and we believe that this power certainly includes the power to provide a proper judiciary as a necessary part of such government.

We fail to appreciate the force of the many citations in the briefs for plaintiffs, referring to the nullity of the courts of the Confederate States, because such courts were not established by any branch of the government of the United States, but by its enemies. They were not established by our Congress, by our President or by our military commanders. But it will be noticed that the courts established in occupied belligerent portions of the rebellious States, by our President or military authorities during the civil war, as above referred to, were sustained.

The Treaty of Paris made no provision for the temporary government of this Island, but in section 12 it appears to contemplate that suits pending in the Spanish courts at the date of the treaty should be transferred to whatever courts were substituted therefor.

An examination of the military orders issued, as we have already stated, will show that the courts of the Island had been radically changed before the signing of the treaty or its ratification, and that a large number of all sorts of existing laws were amended or substituted by military orders, and entirely new laws at times pro-
34 mulgated. In fact, as we have shown, the entire judicial system of Porto Rico was changed and reorganized by G. O. No. 118, dated August 16, 1899, a month and a half after the creation of this provisional court, and several months after the ratification of the treaty, and an entirely new system of courts for the Island was created. All the old courts of first instance, audiencias and other courts of the Island, which had existed up to that date by the order and sufference of the military authorities, were annulled and in lieu thereof municipal and district courts and a supreme court,—a new system in fact from the lowest to the highest tribunal, was established. These courts, including the provisional court, continued to exist up to the time of the passage by Congress of the Foraker Act, on April 11, 1900, and the establishment of civil government under it, on May 1st of that year. And some of the local courts continued until their reorganization was effected by various acts of the local legislative assembly of Porto Rico several years after the establishment of civil government.

An examination of the first section of G. O. No. 88, creating this provisional court, will, we repeat, plainly show that it was nothing but a military expedient, made necessary by existing conditions, and although called such, it was in no sense a United States Court, while for purposes of convenience, and to avoid having to write out the judiciary and practice acts in the order itself, they were referred to therein. It will be seen that it had one law judge and two army officers as associate judges of fact; that its jurisdiction was of the broadest kind, and in certain matters was fixed at a minimum as low as fifty dollars. We therefore cannot see the application of the rather lengthy list of citations and array of quotations made
35 to us by counsel for plaintiffs, against its jurisdiction under the laws and decisions referring to jurisdiction and practice in circuit and district courts of the United States. Those matters might have been entertained if presented to the provisional court itself at the proper time. If it had any authority for its existence, they are certainly improper here as a collateral attack.

We are not informed as to how much litigation was tried before this provisional court during its eight or nine months of existence, but it is said to have been quite considerable. If the doings of this provisional court are to be overthrown, then the doings of all the insular courts, also established after the treaty, in like manner must be overthrown, and the consequences to property rights that would ensue would be appalling. We are aware that this fact should not militate against plaintiffs' rights to recover their property if they were wrongfully deprived of it, and the matter is mentioned only because of its importance and to justify us in acting with caution. The serious objection which of course can always be raised to the action of a military court is, that there is usually no appeal from it

to the Supreme Court of the United States, but this objection lies as well against the doings of all the local insular courts as against this so-called United States Provisional Court.

Let us not forget that these plaintiffs, although as we see on an examination of the record, they were, as we believe, properly cited and had what we feel was sufficient reasonable notice of the suits in the Provisional Court, failed to appear therein or in any manner plead, answer or demur in the causes against them, but let the same go to judgment and their property be sold thereunder. Even after judgment they did not go before the Provisional Court and move
36 to have the action set aside, or for a re-hearing, or take any action in the premises even after the organization of this court. And when by law the Records from the Provisional Court were brought here, they did not make any effort, as they probably might have done, for a rehearing or to take an appeal to the Supreme Court of the United States. Instead they stood by, without giving any notice, or making any complaint, and let innocent purchasers take their property, and go into peaceable possession of it, and use it as their own and sell it to others, and years after come and sue to recover it. Ordinarily, the doctrines of laches and estoppel would have bearing against them.

It is unnecessary perhaps to lay it down as a decided point in this case, but it does seem that due process of law under the Constitution in the several States of the Union, or of the Territories over which the Constitution has been extended in its entirety, implies quite different rules of procedure, than it does in a locality such as Porto Rico was in the interim between the treaty and the organization of civil government.

During the nine or ten months we have been upon this bench, it has come to our knowledge as history, although it appears now to have entirely passed away, that the feeling between the Spanish official class, and the native Porto Ricans previous to and immediately after the American occupation, was not at all cordial. As no one but Porto Ricans and Americans, or those who would acknowledge allegiance to our government, could hold office under the military occupation, it resulted that Spaniards were subject to resentments from those who, with or without reason, believed they
37 had formerly been oppressed by them. Moreover, a Spanish speaking people such as the Porto Ricans were, in the nature of things, immediately after the change of sovereignty, could not satisfactorily administer our laws, or be understood by the large majority of American officials and citizens crowding into the Island; and a "United States Court" probably became, and was as necessary as the policing of the Island. If fact, we think this is manifest from the first section of General Order No. 88 before referred to. The court was probably organized from sheer necessity.

We hold therefore that as to newly acquired territory, for which Congress has not as yet established a system of civil government, the military authority established therein during the conquest, even after the date of the treaty of peace, continues in plenary control in the exercise of its own prescribed powers until it is duly displaced by

the legislation of Congress. Common sense as well as the interests of the nation, and indeed the interests of the conquered, require this. The opinions of mankind approve it. Congress itself has repeatedly sanctioned it, and we feel that it is now so firmly established as that it cannot be denied.

Many things are being done in these modern times by Congress itself, and by the Executive, that under the Constitution they have always had power to do, but the necessity for the exercise of which only arose out of our recent great political and industrial expansion. That which subserves the interests of the nation as a matter of policy, and is necessarily an implied power of the legislative or executive branch of the government, is sanctioned by the Supreme Court.

38 Therefore, as we think the United States Provisional Court for Porto Rico was properly established and had jurisdiction of the original suits, out of which the litigation arose, plaintiffs have slept upon their rights, if they could have asserted any, and all their objections to the so-called want of due process of law, and their insistence that they can make this collateral attack on the judgment of a competent court, must be denied.

For these reasons, we feel that the general demurrer to the declaration in each of the above entitled cases should be sustained with costs, and the suits dismissed, and it is so ordered.

B. S. RODEY, *Judge.*

39 *Petition for Writ of Error.*

(Filed March 30, 1907.)

JOSÉ ELIAS SANTIAGO ET AL.
vs.
ANTONIO PONS NOGUERAS ET AL.

José E. Santiago and Ana Matilde Gonzalez, plaintiffs in the above entitled cause, feeling themselves aggrieved by the judgment of the Court sustaining the demurrer in the above entitled cause and dismissing the complaint entered on the 27" day of March 1907, come now by their attorneys Francis H. Dexter and Henry F. Hord, and petition said Court for an order allowing said plaintiffs to prosecute a writ of error to the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and that the amount of the bond be fixed by the Court.

San Juan, P. R., March 30, 1907.

HENRY F. HORD,
F. H. DEXTER,
Attorneys for Plaintiffs.

Assignment of Errors.

(Filed March 30, 1907.)

Law. No. 428.

JOSÉ ELIAS SANTIAGO ET AL.
vs.
ANTONIO PONS NOGUERAS ET AL.

Plaintiffs in the above entitled cause present the following assignment of errors upon which they rely for a reversal of
40 the judgment rendered.

First. The Court erred in sustaining the demurrer herein upon the matters and facts set forth in the complaint all of which were admitted in said demurrer.

Second. The Court erred in holding that the Provisional Court had the power or jurisdiction to try the original case and to render the judgment upon which the property of plaintiffs was sold.

Third. The Court erred in holding that even if the Provisional Court had jurisdiction over such class of cases, it had jurisdiction over the particular case and parties in which the judgment complained of was rendered, since whatever jurisdiction it had could, under General Order 88, have been only the jurisdiction of a Circuit Court of the United States for the trial of such class of cases.

Fourth. The Court erred in holding that the judgment of the Provisional Court complained of, could not be collaterally attacked even though the allegations of the complaint were true, or even if the Provisional Court, exercising the jurisdiction of a Circuit Court of the United States had no jurisdiction over the original case complained of or the parties thereto.

Wherefore said plaintiffs pray that the judgment of the said court be reversed.

HENRY F. HORD,
F. H. DEXTER,
Attorneys for Plaintiffs.

41 *Order Allowing Writ of Error.*

(Filed March 30, 1907.)

Law. No. 428.

JOSÉ ELIAS SANTIAGO ET AL.
vs.
ANTONIO PONS NOGUERAS ET AL.

At a stated term, to-wit, the October Term 1906, of the District Court of the United States for Porto Rico, held in the City of San Juan, and at a session thereof on the 30th day of March, 1907.

Upon motion of Francis H. Dexter and Henry F. Hord, attorneys for the above-named plaintiffs, and upon the filing of a petition for a writ of error and an assignment of errors,

It is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and,

It is further ordered that the amount of the bond for costs and supersedeas is fixed at seven hundred and fifty dollars.

B. S. RODEY, *Judge.*

42 *Bond on Writ of Error.*

(Filed May 29, 1907.)

JOSÉ ELIAS SANTIAGO & WIFE
vs.
ANTONIO PONS ET AL.

Know all men by these presents, that we, José Elias Santiago, as Principal, and Henry F. Hord and Francis H. Dexter, as Sureties, are held and firmly bound unto Antonio Pons Nogueras; Juan Pons Colon; Amador Pons Colon, and the American Colonial Bank, their executors, administrators or assigns, in the sum of $750.00, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29th day of May, 1907.

Whereas, lately at a session of the District Court of the United States for Porto Rico, in a suit pending in said Court between the parties above entitled, a judgment was rendered against the said José Elias Santiago, and wife, and in favor of the payees in this bond; and the said José Elias Santiago, plaintiff herein, having obtained from said Court an order allowing a Writ of Error to the Supreme Court of the United States to reverse the said judgment.

Now, therefore, the condition of this obligation is such that if the above named José Elias Santiago and Wife shall prosecute said Writ of Error to effect and answer all costs and damages to the amount limited aforesaid, if they shall fail to make good their plea then this obligation shall be void; otherwise to remain in full force and effect.

San Juan, Porto Rico, May 29th, 1907.

JOSÉ ELIAS SANTIAGO.
HENRY F. HORD.
FRANCIS H. DEXTER.

43 Henry F. Hord and Francis H. Dexter say that they are worth in visible property in this District, over and above all exemptions, the sum of the foregoing bond.

FRANCIS H. DEXTER.

Subscribed and sworn to before me this 29th day of May, 1907.

H. H. SCOVILLE, *Clerk.*

Approved May 29, 1907.

B. S. RODEY, *Judge.*

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44 In the District Court of the United States for Porto Rico, Sitting at San Juan.

JOSÉ ELIAS SANTIAGO and ANA MATILDE GONZALEZ, His Wife,
vs.
ANTONIO PONS NOGUERAS, JUAN PONS COLON, and AMADOR PONS COLON, Doing Business under the Name of Pons & Company, and THE AMERICAN COLONIAL BANK.

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing forty-three typewritten pages, numbered from 1 to 43, inclusive, to be a true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said District Court this 17th day of June, A. D. 1907.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.

45 In the District Court of the United States for Porto Rico, Sitting at San Juan.

Law. No. 428.

JOSE ELIAS SANTIAGO and ANA MATILDE GONZALEZ, His Wife,
vs.
ANTONIO PONS NOGUERAS, JUAN PONS COLOM, and AMADOR PONS COLOM, Doing Business under the Name of Pons & Company, and THE AMERICAN COLONIAL BANK.

Writ of Error.

UNITED STATES *for* AMERICA, *ss:*

The President of the United States to the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for Porto Rico, before you, between Jose Elias Santiago and Ana Matilde Gonzalez, plaintiffs in error, and Antonio Pons Nogueras, Juan Pons Colon and Amador Pons Colon and the American Colonial Bank, defendants in error, a manifest error hath hap-

pened, to the great damage of the said Jose Elias Santiago and Ana Matilde Gonzalez, plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,
46 that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, sixty days from the date of this writ, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the thirtieth day of March, in the year of our Lord one thousand nine hundred and seven.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.

Allowed by:

B. S. RODEY,
Judge of the District Court of the United States for Porto Rico.

Service of within writ of error and receipt of a copy thereof is hereby admitted this 4" day of April, 1907.

CHAS. HARTZELL,
M. RODRIGUEZ SERRA,
Attorney- for Defendants in Error.

47 [Endorsed:] U. S. District Court for Porto Rico. Law. No. 428. Jose Elias Santiago *et al. vs.* Juan Pons Nogueras *et al.* Writ of error. Filed clerk's office, United States district court, March 30, 1907. H. H. Scoville, Clerk of the Court, by A. M. Bacon, Deputy. D. P. 28.

48 In the District Court of the United States for Porto Rico, Sitting at San Juan.

José E. Santiago and Ana Matilde Gonzales y Rodriguez, His Wife,
vs.
Antonio Pons Norgueras et al.

United States of America, *ss:*

The President of the United States to Antonio Pons Norgueras, and Juan Pons Colon, and Amador Pons Colon, doing business under the name of Pons & Company; or their attorneys, Charles Hartzell and Manuel Rodriguez Serra, and the American Colonial Bank, by its attorney, Robert H. Todd:

Citation.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, within sixty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for Porto Rico at San Juan, wherein José Elias Santiago and Ana Matilde Gonzalez y Rodriguez, his wife, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment of the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness: The Honorable Bernard S. Rodey, Judge of the
49 District Court of the United States for Porto Rico this fourteenth day of June, 1907.

[Seal United States District Court for the District of Porto Rico.]

B. S. RODEY, *Judge.*

Attest:

H. H. SCOVILLE, *Clerk.*

Service of copy of foregoing citation accepted this fourteenth day of June, 1907.

CHAS. HARTZELL,
M. RODRIGUEZ SERRA,
Attorneys for Antonio Pons Norgueras, Juan Pons Colon, and Amador Pons Colon, Doing Business under the Name of Pons & Company.
R. H. TODD,
Attorney for the American Colonial Bank.

50 [Endorsed:] No. 428. In the District Court of the United States for Porto Rico. José E. Santiago and Ana Matilde Gonzalez y Rodriguez, his wife, *vs.* Antonio Pons Norgueras *et al.* Citation. Filed Clerk's Office, United States District Court, June 14, 1907. H. H. Scoville, Clerk of the Court, By A. M. Bacon, Deputy.

51 In the Supreme Court of the United States.

October Term, 1907.

No. 383.

JOSE ELIAS SANTIAGO and ANA MATILDE GONZALEZ, Plaintiffs in Error,

vs.

ANTONIO PONS NOGUERAS, JUAN PONS COLON, and AMADOR PONS COLON, Doing Business under the Name of Pons & Company, and THE AMERICAN COLONIAL BANK.

No. 384.

JOSE ELIAS SANTIAGO and ANA MATILDE GONZALEZ, Plaintiffs in Error,

vs.

GIL RAMON GONZALEZ Y RODRIGUEZ.

No. 385.

JOSE ELIAS SANTIAGO and ANA MATILDE GONZALEZ, Plaintiffs in Error,

vs.

TEODORO MOSCOSO and ALEJANDRINA MORA Y FAJARDO, His Wife.

No. 386.

JOSE ELIAS SANTIAGO and ANA MATILDE GONZALEZ, Plaintiffs in Error,

vs.

ANA SEMIDEY, Widow of ANTONIO COSTA, ANTONIO COSTA Y SEMIDEY, AUGUSTIN COSTA Y SEMIDEY, ET AL.

Stipulation.

Whereas the questions involved in each of the above entitled causes and open for argument under the respective writs of error from the Supreme Court of the United States are practically, if not identically the same;

And whereas the record in any one of said causes might well be taken as the record in each of the others;

52 Now therefore, it is this 26″ day of December A. D. 1907, hereby stipulated and agreed by and between the attorneys of record for each of the parties in the above entitled causes that the transcript of record in cause No. 383 only shall be printed and that the rights of the parties to each of the remaining causes shall be determined by and abide the judgment to be rendered by this Honorable Court in said cause No. 383, that is to say, if after hearing this Honorable Court shall affirm the judgment of the United States District Court for the District of Porto Rico in said cause No. 383,

then the final judgments of said United States District Court in each of the remaining above entitled causes, shall also be affirmed, and if the said judgment of the United States District Court for the District of Porto Rico in said cause No. 383 shall be reversed by this Honorable Court, then it is stipulated and agreed hereby that like judgments of reversal shall be entered in each of the remaining causes, and so also if the judgment of the United States District Court for the District of Porto Rico shall be in any wise modified, altered or amended, then the judgments of said United States District Court in each of the remaining causes shall be likewise and similarly modified, altered and amended.

FRANCIS H. DEXTER, AND
H. F. HORD,
Attorneys for Jose Elias Santiago and Ana Matilde Gonzalez, Plaintiffs in Error in Each of the Above Entitled Causes.

CHAS. HARTZELL AND
M. RODRIGUEZ SERRA,
Attorneys for Defendants in Error in Cause No. 383.

53 CHAS. HARTZELL AND
M. RODRIGUEZ SERRA,
Attorneys for Defendant in Error in Cause No. 384.

CHAS. HARTZELL AND
M. RODRIGUEZ SERRA,
Attorneys for Defendants in Error in Cause No. 385.

W. VINCENT ROBBINS,
Attorney for Defendants in Error in Cause No. 386.

54 [Endorsed:] 127, 20786, in the Supreme Court of the United States. October Term 1907. Nos. 383, 384, 385, 386. Jose Elias Santiago and Ana Matilde Gonzalez, Plaintiffs in Error *vs.* Various Defendants, Stipulation of Counsel. Law Offices of Wayne MacVeagh, Frederic D. McKenney, John Spalding Flannery, William Hitz, 1317 F Street, N. W., Washington, D. C.

55 [Endorsed:] File Nos. 20,786-7-8 & 9. Supreme Court U. S. October Term, 1908. Term Nos. 127-8-9 & 130. Jose Elias Santiago *et al. v.* Antonio Pons Nogueras *et al.* Jose Elias Santiago *et al. v.* Gil Ramon Gonzales &c. Jose Elias Santiago *et al. v.* Teodoro Moscoso *et al.* Jose Elias Santiago *et al. v.* Ana Semidey, widow &c. Stipulation that record in No. 127 only be printed & that Nos. 128, 129 & 130 abide result in No. 127. Filed Nov. 23d, 1908.

Endorsed on cover: File No. 20,786. Porto Rico, D. C. U. S. Term No. 127. Jose Elias Santiago and Ana Matilde Gonzalez, plaintiffs in error *vs.* Antonio Pons Nogueras, Juan Pons Colon, and Amador Pons Colon, doing business under the name of Pons & Company, and the American Colonial Bank. Filed July 10th, 1907. File No. 20,786.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

Nos. 127, 128, 129 and 130.

JOSE ELIAS SANTIAGO, et al.,

vs.

ANTONIO PONS, et al.

JOSE ELIAS SANTIAGO, et al.,

vs.

GIL RAMON GONZALEZ.

JOSE ELIAS SANTIAGO, et al.,

vs.

TEODORO MOSCOSO.

JOSE ELIAS SANTIAGO, et al.,

vs.

ANA COSTA, et al.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This brief is submitted by Plaintiffs in Error in the four cases, Nos. 127, 128, 129 and 130 of the October Term, 1908, of the Court.

As the same issues of law are involved in each of the four cases, a stipulation was entered into by and between Plaintiffs in Error and Defendants in Error in all of the cases, respectively, by which it was agreed that the Transcript of Record in only one of the causes should be printed,

and that the rights of the parties to each of the remaining causes shall be determined by and abide the judgment to be rendered by this Honorable Court in the cause in which the said Transcript was printed-namely, Cause No. 383 of the October Term, 1907, which appears upon the October Term, 1908, as Cause No. 127. The other causes appear upon the present October Term as Nos. 128, 129 and 130.

The Transcripts of Record in all of these cases have been duly returned to this Court as a result of a Writ of Error properly sued out and allowed and citations duly issued.

Judgment was rendered below in all of these cases in favor of Defendants in Error upon demurrers filed by them, respectively, to the complaints, there being no answers thereafter filed and final judgment being accordingly entered.

The question presented to this Court upon the records of these cases, therefore, are purely legal.

The complaints filed below by Plaintiffs in Error were substantially similar. The object of each was to recover judgment for the possesion of certain property of Plaintiffs in Error acquired by Defendants in Error, respectively, under and through execution sales made by the Marshal of the Provisional Court under certain judgments rendered therein by default against Plaintiff in Error, José Elias Santiago. The complaints in the cases for which Writ of Error is now brought recited that in the year 1900 Plaintiffs in Error were the owners, and in possesion, of certain real-estate in Porto Rico, therein particularly described; that in the months of March and April, 1900, four actions were brought in the Provisional Court in San Juan, Porto Rico, established by virtue of General Orders No. 88 of the Military Goverment of Porto Rico under date of June 27, 1899, by one Antonio Alvarez Nava against Plaintiff in Error, José Elias Santiago.

In No. 127 the record shows that the action instituted by the said Alvarez Nava against Plaintiff-in-Error José Elias Santiago was to recover the sum of 4,802.31

pesos, provincial currency; that in the complaint in the said action in the Provisional Court it was recited that said Alvarez Nava, Plaintiff, was a subject of the King of Spain, and that Defendant therein, José Elias Santiago, was a citizen and resident of Porto Rico. The action in the Provisional Court was designated an action "in assumpsit".

In No. 128 the complaint below recited that the action in the Provisional Court, against which relief was sought, was instituted by the said Alvarez Nava against Plaintiff in Error, José Elias Santiago, to recover the sum of $1,294.20, U. S. Currency, upon a promissory note, being designated "in assumpsit".

In No. 129 the complaint below recited that the declaration in the Provisional Court in the case in which relief was sought was filed by the said Alvarez Nava against Plaintiff in Error José Elias Santiago, to recover the sum of $1,294.20, U. S. Currency, upon a promissory note, the complaint being designated "in assumpsit".

In No. 130 the complaint below recited that the declaration in the Provisional Court in the suit in which relief was sought was filed by the said Alvarez Nava against Plaintiff in Error, José Elias Santiago, to recover the sum of $2,889,35 U. S. Currency, upon a promissory note, the said declaration in the Provisional Court being entitled "in assumpsit".

In all of said actions instituted in the Provisional Court attachments were issued simultaneously with the filing of the declarations, which were levied upon various properties of Plaintiffs in Error described in the said declarations and in the complaints herein, which said attachments were issued upon affidavits made in behalf of Plaintiff therein setting forth that:

> "Affiant believes that Defendant intends to and "will fraudulently part with or sell his property "before judgment can be recovered against him or "said action concluded, and said judgment cannot be "satisfied out of the property of the said Defendant, "and Plaintiff, through your affiant, prays a Writ "of Attachment against a sufficient amount of the

"goods and chattels of Defendant to recover any "judgment which Plaintiffs may recover.

Upon the filing of the declarations in the Provisional Court summons were issued in each of the four cases, addressed to Defendant therein, José Elias Santiago.

In Cause No. 127 the complaint below recites that the summons issued in the Provisional Court in the case in which relief is sought was issued on the 29th day of March, 1900, and was returnable on the 11th day of April, 1900, and that on the 21st day of April, 1900, a judgment by default was rendered in the Provisional Court against the said José Elias Santiago for the amount sued-for.

In No. 128 the complaint below recited that in the action in the Provisional Court, against which relief is sought, summons was issued on the 11th day of April, 1900, returnable on the 23rd day of April, 1900, and that on the 30th day of April, 1900, a judgment by default was entered by the said Provisional Court against the said José Elias Santiago for the amount prayed.

In Cause No. 129 the complaint below recited that in the action instituted in the Provisional Court, against which relief was sought, summons was issued on the 11th day of April, 1900, to the said José Elias Santiago, returnable on the 23rd day of April, 1900, and that on the 30th day of April, 1900, a judgment by default was by the said Provisional Court entered against the said José Elias Santiago for the amount prayed.

In Cause No. 130 the complaint below recited that in the action instituted in the Provisional Court, in which relief was sought, summons was issued against the said José Elias Santiago on the 29th day of March, 1900, returnable on the 11th day of April, 1900, and that on the 21st day of April, 1900, a judgment by default was entered by the said Provisional Court against the said José Elias Santiago for the amount prayed.

The records in all of these cases show that upon the rendition of said judgment by default executions were issued thereon, respectively, and the various properties described

in the complaints below were sold by the Marshal of the said Provisional Court, said properties subsequently coming into the possession of Defendants in Error, respectively.

In all of the cases before this Court the complaints below attacked the jurisdiction and proceedings of the Provisional Court, alleging that such proceedings and the judgments rendered therein were absolutelly null and void. The principal point made below was that at the time of such proceedings, a state of peace prevailing in Porto Rico and competent civil tribunals duly recognized by the Military Government being in existence and performing their functions, such Military Government was without the power to invest the Provisional Court with the jurisdiction attempted to be given it by the said General Orders No. 88, series of 1899.

It is further insisted that even if the Military Government had the power to invest the Provisional Court with the jurisdistion which Defendants in Error contend was given to it by the said General Orders No. 88, the proceedings of the Provisional Court in the cases complained of were so clearly in disregard of law and of the jurisdiction attempted to be granted as to be absolutely null and void, and that all proceedings therein and the sale of the property upon the judgments therein rendered were also absolutely null and void.

The complaint filed below, which appears in the Transcript printed in Case No. 127, contains substantially all of the facts upon which Plaintiffs in Error rely to attack the said proceedings and judgments of the Provisional Court, with the exeption that the Transcript printed in No. 127 does not show the allegations contained in the declarations filed in the Provisional Court in the other three cases with respect to citizenship and the amount in controversy.

But these facts appear in the Transcripts which have been sent up by the Trial Court, and we presume that these records will be considered by this Court for the purpose of weighing the jurisdiction of the Provisional Court insofar as the same was invoked in the other three cases on the ground of the diversity of citizenship.

In Case No. 127 the complaint below recited that in a previous action instituted by Plaintiffs in Error against Defendants in Error in the District Court of the United States for Porto Rico, in which relief was sought from the judgment of the Provisional Court with respect to the property in possession of Defendants in Error in No. 127 a judgment had been rendered by the said District Court of the United States for Porto Rico against the Plaintiffs in Error and in favor of Defendants in Error.

But Plaintiffs in Error claim that said judgment does not have the force of **res judicata,** because there was not involved therein the same identical issues as were involved in the trial of Case No. 127 below. The demurrer in Case No. 127 is a **general** one with respect to the validity of the proceedings of the Provisional Court, and **special** as to the said defense of res judicata.

In the other three cases the demurrers were general, involving only the validity of the proceedings in the Provisional Court.

Upon a consideration of these demurrers the Court below delivered a lengthy opinion, upon which final judgments were entered, sustaining said demurrers and dismissing the suits. From these judgments Writs of Error have been duly prosecuted.

The attention of the Court may be attracted to the complaints filed in the Court below. We confess that they may appear to be anomalous and extraordinary, viewed in the light of the American codes and practice, but when the Court considers the anomalous condition of affairs existing in Porto Rico with reference to practice and procedure these complaints may not be made the occasion of very harsh criticism. The complaints in the cases at bar were filed in the District Court of the United States for Porto Rico in November, 1906. In 1904 a so-called Code of Civil Procedure was adopted by the Legislative Assembly of Porto Rico. By its terms and provisions "all laws royal decrees, orders, military orders, acts or parts of acts, inconsistent or in conflict with this code, are hereby

repealed." It has been understood, thefore, that the former Spanish Code of Civil Procedure (Ley de Enjuiciamiento Civil) was completely abrogated by this new act.

This new act is but a garbled adoption of the Code of Civil Procedure of California. It provides, in a most incomplete manner, a system of civil procedure. It does not recognize the distintion between legal and equitable actions.

As neither the Common Law of England nor the equity jurisprudence known to England and the United States prevail in Porto Rico, the pleader is left in the dark as to what constitutes the proper statement of a cause of action. The fine distinctions which exist in the United States between legal and equitable remedies does not here exist. In the case at bar the object of the complaints were, as heretofore stated, to recover property of which Plaintiffs had been deprived by what they consider to be absolutely void proceedings. Anticipating that these void proceedings of the Provisional Court would be pleaded by way of defense, Plaintiffs set forth the same fully in their complaints and attacked them collaterally.

Under the loose and dubious practice act of 1904 there is nothing, in our judgment, to base a criticism of these apparently anomalous complaints.

ASSIGNMENTS OF ERROR.

Plaintiffs in Error assign the following errors, which are common in all of the actions:

(1) The Court erred in sustaining the demurrers upon the matters and facts set forth in the complaint, all of which were admitted in said demurrers.

(2) The Court erred in holding that the Provisional Court had the power or jurisdiction to try the original cases and to render the judgments upon which the property of Plaintiffs-in-Error was sold.

(3) The Court erred in holding that even if the Provisional Court had jurisdiction over such class of cases it had no jurisdiction over the particular cases and parties

in which the judgments complained of were rendered, since the only jurisdiction the said Provisional Court could have under General Orders No. 88, Series of 1899, was the jurisdiction of a Circuit Court of the United States.

(4) The Court below erred in holding that the judgments of the Provisional Court complained of could not be collaterally attacked, even though the allegations of the complaint were true, or even if the Provisional Court, exercising the jurisdiction of a Circuit Court of the United States, had no jurisdiction over the original cases complained of, or the parties thereto.

These assignments were duly presented below and were accompanied by the usual prayer for reversal.

BRIEF AND ARGUMENT:

The points of law presented by Plaintiffs-in-Error are, as follows:

(1) They challenge the power of the Provisional Court to try the original cases, which resulted in judgments against Plaintiff-in-Error, José Elias Santiago and the sale of the property described in these suits. We maintain that under the circumstances then existing, considering the institutions and laws of the United States and the condition of peace then prevailing, the President had no power to create the Provisional Court. The Treaty of Peace between the United States and Spain had been ratified and the courts of the Island were being conducted regularly and normally, in accordance with the local laws, which had been ratified and sanctioned by the Military Government. (Magoon's Reports, p. 13).

(2) Plaintiffs-in-Error maintain that even if it be held that the Military Government had the power on June 27, 1899, to create courts for the trial of all kinds of cases, civil or criminal, in addition to, or substitution of, ordinary courts then in existence in the Island, General Orders No. 88, Series of 1899, creating the Provisional Court, cannot be construed to sustain the jurisdiction of said court over the original cases against which relief is sought. By such

Order (although vague in its terms) the only construction to be reasonably made thereof is that with respect to civil cases the jurisdiction of the Provisional Court was limited to such jurisdiction as circuit and district courts of the United States at, the time possessed under the Constitution and laws of the United States then in force.

The General Orders No. 88, Series of 1899, referred-to is, as follows:

"I. In view of the existing and steadily increasing "legal business requiring judicial determination, "which does not fall within the jurisdiction of the "local Insular courts, such as smuggling goods in "evasion of revenue laws, larceny of United States "property, controversies between citizens of diffe- "rent states, and of foreign states, violation of the "United States postal law, &c., &c., and pursuant to "authority from the President of the United States, "conveyed by endorsement of April 14, 1899, from "the Acting Secretary of War, and after full con- "ference with the Supreme Court and members of the "Bar of the Island, a United States Provisional Court "is hereby established for the Department of Porto "Rico.

"II. The judicial power of the Provisional Court "hereby established shall extend to all cases which "would be properly cognizable by the Circuit or "District Courts of the United States under the "Constitution, and to all common law offenses within "the restrictions hereinafter specified.

"III. Art. III, Sec. 2, paragraph 1, of the Cons- "titution is as follows:

1. "The judicial Power shall extend to all Cases, "in Law and Equity, arising under this Constitu- "tion, the Laws of the United States, and the "Treaties made, or which shall be made, under "their authority; to all Cases affecting Ambassa- "dors, other public Ministers and Consuls; to all

"Cases of Admirality and Maritime Jurisdiction; "to all controversies to which the United States "shall be a Party; to controversies betwen two or "more States; between a State and Citizens of "another State; between Citizens of different "States; between Citizens of the same State clai- "ming Lands under Grants of different States, "and between a State, or the Citizens thereof, and "Foreign States, Citizens or Subjects.

"IV. The decisions of said Court shall follow "the principles of common law and equity as esta- "blished by the Courts of the United States, and its "procedure, rules and records shall conform as "nearly as practicable to those observed and kept "in said Federal Courts. Its terms and places of "sitting shall be fixed by the Court at such times "arnd places as may be most conveniet for the "parties litigant and to insure the expeditious tran- "saction of business.

"V. The Provisional Court shall consist of three "judges,one of whom shall be known as the Law "Judge, and the other two as Associate Judges, one "United States District Attorney, one Marshal, one "Clerk, theree Deputy Clerks, one Stenographer and "Reporter, one Interpreter, one Bailiff and Janitor, "and one Messenger. The Law Judge shall preside "and shall determine and decide all technical ques- "tions of law. A majority vote of the bench shall "determine all questions of fact. The jury system "may be introduced or dispensed with in any par- "ticular case in the discretion of the Court.

"VI. The Judges of the Provisional Court shall "be clothed with the powers vested in the Judges "of the Circuit or District Courts of the United "States.

"VII. The District Attorney shall be authorized "to present to the Court informations against all "parties for violations of United States Statutes and

"regulations. He shall also in like manner present "informations for violations of orders issued by the "Department Commander, relating to civil matters, "which may be referred to him from these headquar- "ters. It shall be his duty to represent the United "Statesin all suits to which it is a party, and to "perform such other duties as usually pertain to the "District Attorneys in the Federal Courts of the "United States.

"VIII. In order to define more clearly certain "branches of the criminal jurisdiction of the Provi- "sional Court, it is hereby provided that it shall "include and be exclusive in the following classes "of cases:

"1st. All offenses punishable under the statu- "tory laws of the United States, such as those "indicated in paragraph 1, of this order.

"2nd. Offences committed by or aganst per- "sons, foreigners or Americans, not residents of "this Department, but who may be travelling or "temporarily sojourning therein, or against the "property of non-residents.

"3rd. Offences against the person or property "of persons belonging to the Army or Navy, or "those committed by persons belonging to the "Army or Navy, not properly triable by Military "or Naval Courts; but not includng minor police "offences.

"properly triable by Military or Naval Courts; "but not including minor police offences.

"4th. Offences committedby or against forei- "gners or by or against citizens of another State, "District or Territory of the United States, resi- "ding in this Department.

"IX. Cases arising under Article XI of the Treaty "of Peace between the United States and Spain will "be determined as therein provided.

"X. In civil actions when the amount in contro-

"versy is fifty dollars ($50) or over, and in which "any of the classes of persons above enumerated in "paragraph VIII are parties, or in which the parties "litigant by stipulation invokeits jurisdiction, shall "be brought in the Provisional Court: Provided, "That in the determination of all suits to which Porto "Ricans are parties, or of suits arising from contracts "which have been or shall be made under the provis- "ions of Spanish or Porto Rican laws, the Court shall, "as far as practicable, conform to the precedents "and decisions of the United States Courts in similar "cases which have been tried and determined in "Territory formerly acquired by the United States "'from Spain orMexico. In all other civil actions "the case shall lie within the jurisdiction of the "proper insular court as now provided by local law.

"XI. If any party litigant shall feel aggrieved "by the Judgment or decree of said Court, a stay "of ninety days shall begranted such party before "the execution of such judgment or decree, upon the "filing of a bond by him with suretiesin an amount "and with such conditions as the Court may deter- "mine, for the purpose of allowing such party to "make application to the Supreme Court of the "United States for a writ of certiorari or other "suitable process to review such judgment or decree. "But if at the end of said ninety days such process "has not been issued by the Supreme Court execution "shall forthwith issue.

"XII. The Department Commander will exercise "the power of pardon, commutation or mitigation "of punishment in criminal cases.

"XIII. All fees, fines and costs paid to the Clerk "of the Provisional Court shall be turned over by "him at the end of each calendar month to the "Treasurer of the Island with a statement of the "sources from which they are received.

"XIV. Members of the Bar of Porto Rico will

"be admitted to practice in the Provisional Court "upon presentation of a certificate signed by the "President of the Supreme Court of Porto Rico "certifying to their professional standing.

"XV. All lawyers practicing in the Provisional "Court who are unfamiliar with the English language "shall be permitted upon application to use their "own interpreter when addressing the Court.

"XVI. The Court shall adopt an appropriate Seal "which will be procured by the Treasurer of the "Island. The Clerk of the Court shall have the custody of the Seal for use in attesting legal docu- "ments in the usual manner.

"XVII. In accordance with the provisions of "paragraph V, of this order, the following appoint- "ments are announced to take effect July 1st, "1899:

"To be Law Judge:

"Noah Brooks Kent Pettingill.

"To be Provisional United States Attorney:

"J. Marbourg Keedy.

"The following officers are hereby detailed on the "special duty set opposite their respective names:

"Major Eugene D. Dimmick, 5th U. S. Cavalry,

"Major Earl D. Thomas, 5th U. S. Cavalry,

Associate Judges of the
U. S. Provisional Court.

"1st Lieutenant Robert Alexander, 11th U. S. Infantry.

Clerk of the U. S. Provisional Court.

"Private Samuel C. Bothwell, Troop D,

"5th U. S. Cavalry, is detailed on Special "duty as Marshal of the U. S. Provisional "Court.

"The necessary deputies will be detailed in "subsequent orders.

"The officers named will proceed to San Juan

"and report to the Adjutant-General of the "Department.

"The travel enjoined is necessary for the public "service.

"By Command of Brigadier-General Davis:

W. P. HALL,
Adjutant-General.

We contend that the Provisional Court did not have jurisdiction of the cases complained of, because they were not such as a circuit court or district court of the United States should have had jurisdiction over. In all of the cases complained of it appears that the Plaintiff was a subject of the King of Spain and that the Defendant was a citizen and resident of Porto Rico.

(3) Plaintiffs in Error contend further taht the proceedings in the Provisional Court were in complete disregard of and in opposition to the Code of Civil Procedure then in force, and that the Provisional Court had no power to make arbitrary rules of procedure different from that provided for in the general law.

(4) The defense of **res judicata** set up in Case No. 127 is not tenable, for the reason that there does not exist the identity necessary to sustain such a plea.

FIRST POINT: The first point may be considered under the following subdivisions:

(1) The power of the Military Governor, or of the President of the Untied States as Commander-in-Chief, under the conditions prevailing in Porto Rico on the 27th day of June, 1899, to create a court having all of the judicial powers of circuit and district courts of the United States.

(2) The power of the Military Governor, or the President of the United States as Commander-in-Chief, on the 27th day of June, 1899, in view of the provisions of the Treaty of Paris, which was then in force, and particularly of Articles 11 and 12 thereof, to permit a Spanish, or other foreign subject, to bring a suit in such Provisional Court against Porto Ricans exclusively, or to be sued in such

Provisional Court by Porto Ricans exclusively, thus making an exception to the operation and effect of the laws of Porto Rico then in force relating to the administration of justice in the Island and determining the jurisdiction of local courts.

SECOND POINT: Plaintiffs-in-Error contend that the proceedings of the Provisional Court were absolutely null and void, even if it be conceded that the Provisional Court was validly constituted and had jurisdiction of the cases before it. At the time the complaints were filed in the Provisional Court to wit, March 1900,-the practice in Porto Rico was governed by the Spanish Code of Civil Procedure (Ley de Enjuiciamiento Civil), promulgated in Porto Rico January 1, 1886, (see War Department translation). This Spanish Code of Civil Procedure was modified to some extent by General Orders No. 118 of the Military Government of Porto Rico of August 16, 1899. Paragraphs 47 to 77, inclusive, of the latter Order apply to civil procedure. A reference to this Order will demostrate that the Provisional Court disregarded it absolutely, so that the proceedings and judgment of the Provisional Court were absolutely null and void. For instance, Paragraph 50 of General Orders No.118 provides that the Defendant shall have a period of 20 days to answer the suit. In the actions complained of, instituted in the Provicional Court, the Defendants therein (Plaintiffs-in-Error herein) were summoned to appear in all of the cases in less than 20 days. The Provisional Court had adopted by rule a code of civil procedure in entire disregard of the local law. As a matter of curiosity, we submit the rules of the Provisional Court relating to "Proceedings at Law" as published and found in the rules of that Court:

PROCEEDINGS AT LAW:
(Page 7).

"**RULE 17**: All suits of civil nature, other than "those in equity and admiralty shall be begun by "summons which shall be issued by the Clerk upon "the praecipe of the Plaintiff's attorney requesting

"the same and shall be returnable on a day to be "named therein, not less than ten nor more than "fifteen days subsequent to the issuance thereof. "But if service upon all the defendants has not been "made ten days before the return day, the defendants "shall have until ten days, after the date of the last "service to enter their appearance in the suit. If "the defendants have not ben served before the "return day, alias summons shall be issued upon "demand. And if under the above provisions the "last day allowed for entering appearance in any "case shall fall on Sunday defendant shall have until "the following day to enter such appearance.

"RULE 18: It shall be the duty of the Plaintiff "to file his declaration and of the Defendant to enter "his appearance on or before the return day of the "writ, except as above specified. If no declaration "is so filed, the suit may be dismissed upon the "praecipe of the opposite party; and if no appearance "is entered as aforesaid a judgment by default may "be entered against the defendants who have been "duly served and fail to appear.

"No plea shall avail the defendant unless its "allegations be verified by the oath of himself, his "agent or attorney, and any plea filed without such "verification is a nullity.

"**RULE 19**: The course of pleadings in action at "law shall be according to the course of the Common "Law, and it shall be the duty of each party to serve "a copy of each pleading filed by him after the "appearance of any defendant is entered upon each "of the opposite parties before the Court at the time "such pleading is filed, or his attorney of record.

"The defendant must file his plea or demurrer to "the declaration within fifteen days after appearance "day and any pleading subsequent in order must be "filed withing fifteen days after the date of the ser- "vice of a copy of the pleading last filed, as herein-

"before provided, or, in case the previous pleading "makes an issue of law, within fifteen days after "the decision of such issue by the Court.

"Service of copies of pleadings under this Rule "may be made eother in person or by mail; provided "that in the latter case Counsel shall certify, that "the address to which said Copy is mailed is known "by him to be correct. The certificate of counsel "to the fact, manner and time or service of copy "shall be endorsed upon the original pleading and "such certificate shall be sufficient evidence of the "facts therein stated. The signing of a false certifi- "cate shall be cause for disbarment.

"**RULE 20**: Writs of attachment and garnish- "ment shall be issued by the Clerk upon the filing "of an affidavit by or on behalf of the plaintiff in "a suit at law, stating that plaintiff has a good cause "of action therein and that affiant has reason to "believe that the defendant intends to and will "fraudulently part with or conceal his property "before judgment can be recovered against him, so "that said judgment cannot be satisfied out of said "property; or that such defendant has departed "the jurisdiction and has so remained, or affiant "believes he intends so to remain, more than sixty "days so that process cannot be served upon him, "or that he is a non-resident.

"**RULE 21**: Attachments and garnishments may "be released by the filing of a bond, with two good "and sufficient obligors, to be approved by the Clerk "or a Judge of the Court, in a penal sum of double "the value of the property attached or money "garnished, conditioned for the return of the pro- "perty or money, or the payment of the appraised "value thereof in case the plaintiff recovers his judg- "ment against the said defendant, and the attach- "ment or garnishment is not dissolved.

THIRD POINT: The defense of **res judicata** was

made in Case No. 127, but not in the other three cases. The complaint in this case (beginning with page 5 of the printed transcript) sets forth a certain action of **ejectment** previously instituted by Plaintiffs-in-Error against certain, but not all, of the defendants to this suit. In that action recovery of the possesion of the property in dispute was sought, based upon the sole and only ground of illegal constitution of the Provisional Court, but there were not submitted the further questions of the absence of jurisdiction of the said Court over the said cause, or the parties thereto, by reason of the absence of diversity of citizenship, or of the requisite amount involved, or of the absence of legal summons, or of the failure to observe the local law of procedure.

We, therefore, submit that as to the defense of res judicata in Case No. 127 the Court erred in sustaining the same.

We respectfully submit that the judgment of the Court below in these cases should be reversed.

F. H. DEXTER,
Attorney for Plaintiff-in-Error.

Supreme Court, U. S.
FILED.
FEB 19 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 127.

JOSE ELIAS SANTIAGO AND ANA MATILDE GONZALEZ, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

ANTONIO PONS NOGUERAS, JUAN PONS COLON AND AMADOR PONS COLON, DOING BUSINESS UNDER THE NAME OF PONS & COMPANY, AND THE AMERICAN COLONIAL BANK, DEFENDANTS.

In Error to the District Court of the United States for Porto Rico

BRIEF FOR DEFENDANTS IN ERROR

CHARLES HARTZELL,
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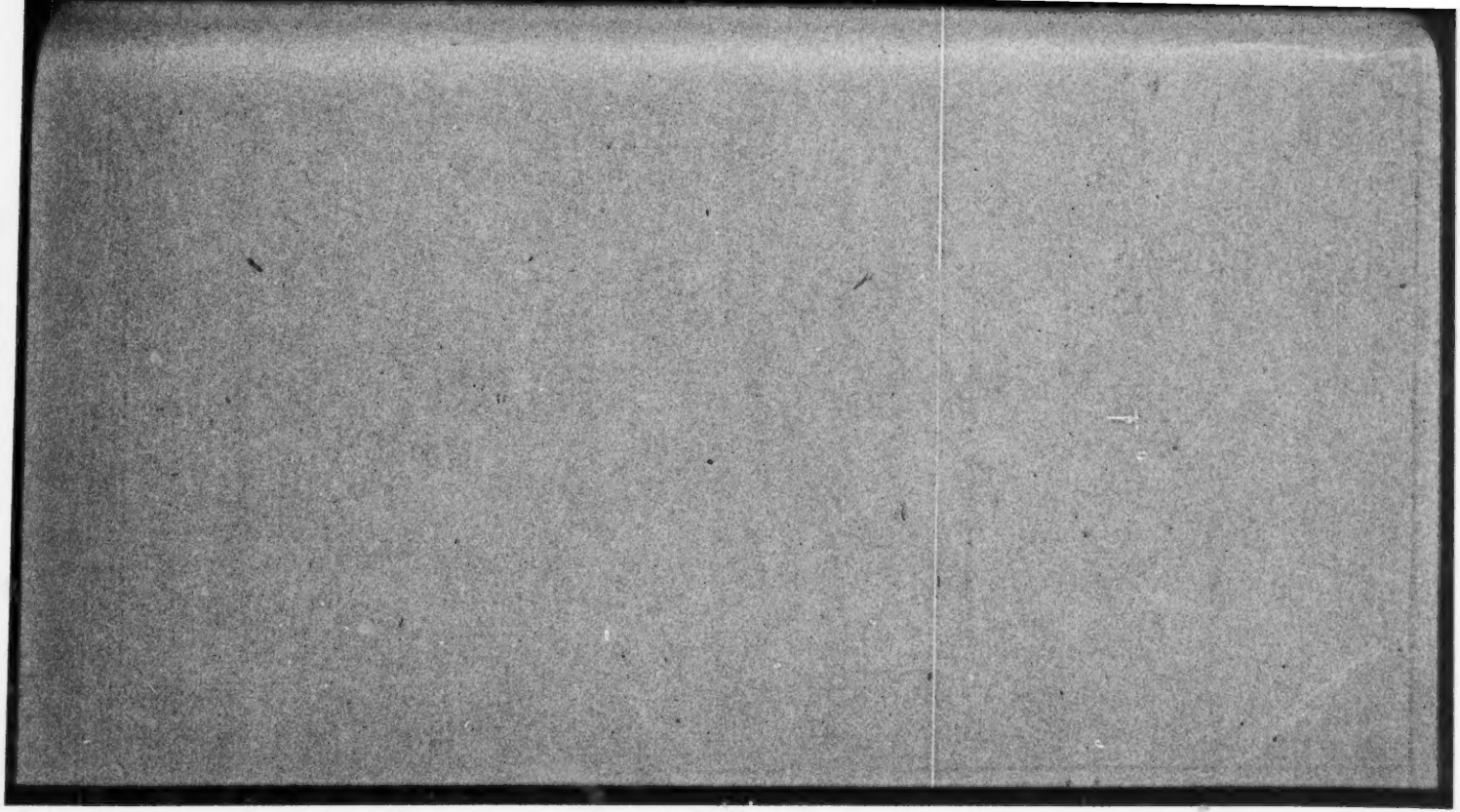

Supreme Court of the United States

OCTOBER TERM, 1908

No. 127

José Elias Santiago and Ana Matilde Gonzalez, his wife,
Plaintiffs in error,

vs.

Antonio Pons Nogueras, Juan Pons Colom, doing business under the name of Pons & Company, and The American Colonial Bank,
Defendants in error.

BRIEF ON BEHALF OF THE DEFENDANTS.

Statement of the Case.

This is a Writ of Error prosecuted by José Elias Santiago and Ana Matilde Gonzalez, his wife, plaintiffs in the above named case, for the reversal of a decision of the District Court of the United States for Porto Rico, dismissing their complaint against the above mentioned defendants.

The plaintiffs in said complaint allege the following facts as their cause of action against defendants:

That on the 29th day of March, 1900, they were the owners and possessors of the properties described in the complaint. Pages 1 and 2 of record. On said day an action was brought in the Provisional Court established by General Order No. 88 of the Military Government of Porto Rico, June 27th, 1899, against plaintiff herein, José Elias Santiago, by one Antonio Alvarez Nava, to recover the sum of four thousand eight hun-

dred and two pesos, thirty-one centavos, upon a promissory note claimed to be due by the said Santiago to one Manuel Gil Sanchez, whose widow, Juana Rivera, assigned the promissory note to Alvarez Nava, a Spanish subject, for the purpose of bringing the suit. Upon the filing of the complaint in the Provisional Court, a summons was issued to the defendant therein, José Elias Santiago, commanding him to appear on the 11th day of April, 1900, to answer to the complaint. Also, a writ of attachment was issued against Santiago. On April 6th a copy of the summons was delivered to the wife of Santiago, at his residence in Aibonito, Porto Rico, but was never personally or in any other manner served on Santiago. On April 6th, the property described in the complaints herein was attached by the Marshal of the Provisional Court. José Elias Santiago did not appear in said cause personally or by counsel. On April 21st, 1900, there was entered by said Provisional Court a judgment in favor of Alvarez Nava for the amount of $2,923.08, with costs, amounting to $22.35. Thereafter, the Provisional Court having been discontinued by virtue of Act of Congress approved April 12th, 1900, establishing a civil government in Porto Rico, an execution was issued by the District Court of the United States for Porto Rico, which had been organized under said Act, upon the said judgment of the Provisional Court, and on December 22nd, 1900, the properties described in the complaint herein were sold by the Marshal of the District Court of the United States for Porto Rico, at public auction, and were purchased at said sale by plaintiff therein, Alvarez Nava. On May 1st, 1901, a portion of the property was transferred by the purchaser at said sale to defendant herein, Antonio Pons Nogueras, who registered his deed in his name in the Registry of Property. On February 23rd, 1906, Antonio Pons Nogueras transferred one of the tracts of land to the firm of Pons & Co. composed of himself, Juan Pons Colon and Amador Pons Colon, the transfer being also recorded in the Registry of Property.

It is alleged that the Provisional Court was organized by General Order No. 88 of the Military Governor of Porto Rico, June 27, 1899, at a time when a state of peace prevailed in Porto Rico, and after the promulgation of the Treaty of peace between the United States and Spain, on April 11, 1899.

Thereafter, José E. Santiago filed a complaint in the U. S. District Court for Porto Rico against defendants herein, Juan Pons Colon and Amador Pons Colon, to recover the possession of one tract of 379 "cuerdas" of these lands, basing his action upon the ground of the illegal constitution of the Provisional Court. On May 9th, 1903, the U. S. District Court for Porto Rico rendered its judgment in said new action, ordering and adjudging that plaintiff, Santiago, take nothing by his suit, and that defendants recover against plaintiff the amount of costs. Plaintiffs also allege that the said proceedings in the Provisional Court and the sale by the U. S. District Court were illegal, null and void; that by reason of said sale, Santiago was ejected from his properties and has not since the date thereof been in possession of any of said properties; that defendant, American Colonial Bank, claims a lien upon one of said properties by reason of a mortgage made by Antonio Pons Nogueras, Juan Pons Colon and Amador Pons Colon, April 6th, 1906, to secure the payment of the sum of $1,500.00. Plaintiffs prayed the Court for judgment for the title and possession of the properties and for damages against defendants.

It further appears that no steps of any kind were ever taken by plaintiffs herein, being defendants in the original litigation, to appeal from, reverse, set aside or modify the original judgment of the Provisional Court, and the judgment of the U. S. District Court.

A demurrer was interposed by defendants herein against the said complaint, on the ground that it fails to show a good cause of action against defendants.

The demurrer was submitted to the U. S. District Court and was sustained and the suits were dismissed. Plaintiffs, feeling themselves aggrieved by the judgment of the Court, petitioned for an order allowing them to prosecute a Writ of Error to the Supreme Court of the United States.

QUESTION.

The Complaint does not state facts sufficient to constitute a cause of action against these defendants, and, therefore, was proper dismissed by the Court below.

POINTS.

1. The matters and things adjudicated and determined in the actions brought before the Provisional Court and the District Court of the United States for Porto Rico are res adjudicata, and constitute a bar as to the matters and things set forth in the complaint in this case.

There is a legal presumption that the proceedings in the Provisional Court were properly conducted, and that the Court had full jurisdiction to determine the matters submitted to it. It is alleged, however, in the complaint:

That such proceedings, the judgment rendered therein, and the sale made thereunder, were null and void for the following reasons, to wit:

Because of the illegal constitution of the said Provisional Court, and its want of jurisdiction to try any such suit.

Because even if it were a legally constituted court the jurisdiction was limited to the jurisdiction of the circuit and district courts of the United States in civil matters, and because of the lack of diversity of citizenship between the parties and the said cause.

Because the said court was without jurisdiction to try the said cause in the manner that it did, in absolute disregard of the laws of Porto Rico and the procedure in force at that time.

Because of the illegality of the summons issued and attempted to be served on plaintiff José E. Santiago.

Because of the illegality of the judgment rendered in the said cause against the plaintiff therein, in that it was ren-

dered without giving said Santiago an opportunity to be heard and did not constitute due process of law.

Let us examine these points separately.

I. The Provisional Court created by the Military Governor of Porto Rico was properly and legally established.

The Provisional Court was created by General Order No. 88, series of 1899, dated June 27th, 1899, of the Military Governor of Porto Rico, Paragraph I of said Order reads as follows:

"In view of the existing and steadily increasing legal business requiring judicial determination, which does not fall within the jurisdiction of the local insular courts, such as smuggling goods in evasion of revenue laws, larceny of United States property, controversies between citizens of different States and of Foreign States, violation of the United States postal laws, etc., etc., and pursuant to authority from the President of the United States, conveyed by endorsement of April 14th, 1899, from the Acting Secretary of War, and after full conference with the Supreme Court and members of the Bar of the Island, a United States Provisional Court is hereby established for the Department of Porto Rico."

Paragraph II is as follows:

"The judicial power of the Provisional Court hereby established shall extend to all cases which would be properly cognizable by the Circuit or District Courts of the United States under the Constitution, and to all common law offences within the restrictions hereinafter specified."

Paragraph III quotes Article III, Section 2, paragraph 1 of the Constitution of the United States.

Paragraph IV reads:

"The decisions of said Court shall follow the principles of common law and equity as established by the courts of the United States, and its procedure, rules and records shall conform as nearly as practicable to those observed and kept

in said Federal Courts. Its terms and places of sitting shall be fixed by the Court . . ., etc."

Paragraph VIII reads:

"In order to define more clearly certain branches of the criminal jurisdiction of the Provisional Court, it is hereby provided that it shall include and be exclusive in the following classes of cases:

"1st. All offences punishable under the statutory laws of the United States, such as those indicated in paragraph I, of this order.

"2nd. Offences committed by or against persons, foreigners or Americans, not residents of this Department, but who may be travelling or temporarily sojourning therein, or against the property of non-residents.

"3rd. Offences against the person or property of persons belonging to the Army or Navy, or those committed by persons belonging to the Army or Navy, not properly triable by Military or Naval Courts; but not including minor police offences.

"4th. Offences committed by or against foreigners or by or against citizens of another State, District or Territory of the United States, residing in this Department."

Paragraph X is as follows:

"(In) civil actions when the amount in controversy is fifty dollars ($50.00) or over, and in which any of the classes of persons above enumerated in paragraph VIII are parties, or in which the parties litigant by stipulation invoke its jurisdiction, shall be brought in the Provisional Court: Provided, That in the determination of all suits to which Porto Ricans are parties, or of suits arising from contracts which have been or shall be made under the provisions of Spanish or Porto Rican laws, the Court shall, as far as practicable, conform to the precedents and decisions of the U. S. Courts in similar cases which have been tried and determined in Territory formerly acquired by the United States from Spain or Mexico. In all other civil actions the case shall lie within the jurisdiction of the proper insular court as now provided by local law."

It is a matter of history, public knowledge, as well as a matter of record in the United States District Court for Porto Rico, that a large number of suits and actions, both legal and equitable in their character, involving large amounts of money, and large and very valuable property, both real and personal, were tried and determined by said Provisional Court from the date of its institution in June, 1899, up to the organization of the District Court of the United States for Porto Rico about the month of July, 1900, and in our examinations of the determinations which have been made, either by the said Provisional Court or by the U. S. District Court, or upon appeal, we have not been able to discover any issue challenging the legal constitution of the said Court or its jurisdiction, as provided in said General Orders, except in the case to which the same plaintiffs unsuccessfully challenged the jurisdiction of the said Court or its legality, in these same matters.

As to the authority of the Military Governor to constitute and create the Court, in the first instance, we have not been able to find the authority from the President of the United States conveyed by the endorsement of April 14th, 1899, from the Acting Secretary of War, and referred to in paragraph 1 of said General Order No. 88, but we assume that such authority was similar to that contained in General Order No. 101, issued by the President of the United States on July 13th, 1898, and which in part recites as follows:

"While the rule of conduct of the American Commander in Chief will be such as has been just defined, it will be his duty to adopt measures of a different kind, if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those which now exist, or to create such new or supplementary tribunals as may be necessary, etc."

We do not assume that the foregoing General Order applied to the specific question of the creation of the Court which we are now discussing, but it goes to show the general authority possessed or at least assumed by the President of the United

States with reference to the conquered territory, which had fallen within the control of the American Army and over which the President of the United States subsequently assumed or was granted the authority to create the Provisional Military Government, which was in control in Porto Rico for almost two years prior to the constitution of the civil government under the present Organic Law passed by Congress.

In General Orders No. 1 issued by the Commanding General of the American Army in Porto Rico, on October 18, 1898, we find, in paragraph 8, the following language:

"The cession of Porto Rico with its adjacent islands to the United States has severed the political relations of the inhabitants thereof with the kingdom of Spain, and until Congress acts, the President of the United States, as Commander in Chief, has placed the newly acquired territory under military government, which is absolute and supreme, etc."

The next paragraph of said General Order provides that provincial and municipal laws, as then existed, would be in force unless incompatible with changed conditions, in which event they might be suspended, and that the same would be administered, substantially, as before the cession to the United States. We find, however, that a large number of the laws were amended and changed by the subsequent military orders, and new laws substituted in lieu thereof. Not only was the Provisional Court which we are now discussing created by the Military Governor, but the entire judicial system of Porto Rico was subsequently changed and reorganized by General Order No. 118, dated August 16th, 1899, and an entirely new system of Courts for Porto Rico was created, abolishing all the courts of first instance and the other Courts of the Island, which had existed up to that date, and substituting in place thereof District and Municipal Courts, and a Supreme Court of Porto Rico, which had never existed prior to that time. This entirely new system of Insular Courts, from the highest to the lowest in the Island created entirely by said General Order No. 118 of the Military Governor existed and by it the judicial affairs of Porto Rico were conducted from said date, August 16, 1899, not only until the time of the operation of the Organic Law, but as to a part of them they con-

tinued until their reorganization was effected by various acts of the Legislative Assembly of Porto Rico, several years after the establishment of the government under the Organic Law. Of course, we appreciate it may not be considered a definite answer to the technical argument in opposition to the powers of the Military Governor to create a Provisional Court, to assert that the entire judicial system of Porto Rico, both civil and criminal, for a considerable period of time was originated and constituted by the same authority. But we apprehend that in a case where property rights and the liberty of hundreds of people might be involved, in determining so technical a question at this date, this Court would be fully justified in hesitating to declare the unconstitutionality or illegality of any of the courts so created.

By the terms of the Organic Act, approved April 12, 1900, certain of the courts created by said General Orders No. 118, by the Military Governor, were expressly recognized and continued in force. Section 33 of the said Act reads as follows:

"That the judicial power shall be vested in the Courts and Tribunals of Porto Rico as already constituted and now in operation, including municipal courts, under and by virtue of General Order No. 118, as promulgated by Brigadier General Davis, U. S. V., August 16, 1899, and also including the police courts established by General Order No. 195, etc."

And by the same section the jurisdiction of said courts and the form of procedure in them, and the various officials and attaches thereof were continued as defined and prescribed in and by said laws, ordinances, and general orders, with a proviso, however, as to the method of appointment of the judges of the different courts, and the officials thereof, which were provided for in different manner. By the next section of the Organic Act, the District Court of the United States for Porto Rico is created, and it is provided "that the same shall be the successor to the United States Provisional Court established by General Order No. 88, promulgated by Brigadier General Davis, and shall be in possession of all records of that Court and take jurisdiction of all cases and proceedings pending therein, and the United States Provisional Court is hereby discontinued."

We invite particular attention to the fact that at the time of the creation of the U. S. District Court for Porto Rico, the proceedings in the original case of Alvarez Nava against plaintiff herein, José E. Santiago, were pending in said Court, and that subsequent to the creation of the said U. S. District Court, the execution was sued out and the sales were had upon which the titles of these defendants are based. We maintain that this action of Congress was not only an express ratification of the authority of General Davis in creating the Provisional Court, but that the language of the section which we have last quoted expressly directed and authorized the continuation and conclusion of the proceedings which were then pending in that case by the United States District Court.

Section 8 of the Organic Act is also an express ratification of the Military Orders and decrees which were in force and effect at the time of the passage of the Act. It provides as follows:

"That the laws and ordinances of Porto Rico, now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered, or modified by military orders and decrees in force when this act shall take effect, etc."

We assume there will be no contention as to the right of the authorities of the United States to take such steps as might be considered advisable for the government of conquered territory, including the power to create courts at will, provided such agents exercising the same had been properly authorized.

Glenn, on International Law, page 218, says:

"The invader at once upon occupation is invested with absolute authority, assuming control over the Legislative and Executive Departments, both civil and judicial administrations being replaced by Military jurisdiction. It is his duty to exercise his authority within bounds established by military necessity and to remember that his authority is temporary in character. He can permit the maintenance of the civil and judicial administration, entirely or in part, as it existed before occupation."

See also Wall, International Law, 469-470. Bluntschli, par. 539-540.

In the case of New Orleans vs. Steamship Co., 87 U. S. 387, this Court said:

"That government had the same power and right in territory held by conquest as if the territory had belonged to a foreign country, and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of Government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. There is no limit to the powers that may be exercised in such cases save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject. They have been repeatedlly applied in this Court." Citing Cross et al. vs. Harrison, 57 U. S. 164. 16 Howard 176, Letensdorfer vs. Watt, 61 U. S. 176. The Grapeshot case, 76 U. S. 129.

In the case of Downes vs. Bidwell, 182 U. S. 244, Mr. Justice Gray, in his opinion, said:

"The civil government of the U. S. cannot extend immediately and of its own force over territory acquired by war, even when possession is confirmed by treaty, but such territory must necessarily in the first instance be governed by the military power under the control of the President, as Commander in Chief, until civil government is put in operation by the action of the appropriate political department, at such time and in such degree as that department may determine."

In view of the foregoing authorities we maintain that the President of the United States, as the Commander in Chief of the Army of the United States and by virtue of his other attributes of authority, and as the representative of the will of the Government of the United States, was in supreme control of, and the authority over the Island of Porto Rico from the time of the establishment of the Military occupation in 1898, until the time when Congress, by means of the Organic Act, provided the first Civil government for the Island. If this is not true, then we beg to inquire where the authority did lie for governing the Island during that period of time. The Treaty of Peace concluded between the United States and

Spain on December, 1898, and ratified and promulgated in April, 1899, made no provision for the temporary government of the Island pending the action of Congress in the premises, the only reference to judicial proceedings being contained in article 18, the second paragraph of which provided that civil suits pending and undetermined at the date of the Treaty shall be prosecuted to judgment before the court in which they may be pending or in the court that may be substituted therefor. This paragraph of the Treaty demonstrates that it was even then contemplated that new courts might be substituted by the United States for the determination of actions which had already been brought and were then pending in the Courts of Porto Rico.

In conclusion of this branch of our argument, we submit to the Court that no power or authority existed for the Government of Porto Rico after the American occupation, and prior to the passage of the Organic Act, except the Military Power, which had supreme authority in accordance with the authority which we have quoted, and that the direct recognition of the Provisional Court by the Organic Act, and the mandatory provision for the continuance of pending proceedings in the Provisional Court to be carried out by the U. S. District Court for Porto Rico, which was established by said Organic Act, must definitely determine the legal existence and validity of the acts of the Provisional Court within the scope of its jurisdiction as provided in the General Order creating it.

II. There was diversity of citizenship between the parties to the suit in the Provisional Court.

The complaint alleges that even if the Provisional Court was legally constituted, its jurisdiction was limited to the jurisdiction of the circuit and district courts of the United States in civil matters, and because of the lack of diversity of citizenship between the parties thereto, it was without jurisdiction over the parties in the said cause.

It is stated in the complaints that Antonio Alvarez Nava, the plaintiff in the action before the Provisional Court, was

a subject of the King of Spain, and that defendant therein, José E. Santiago, was a citizen and resident of Porto Rico.

Under those circumstances we do not hesitate to say that there was diversity of citizenship between said parties. If there was not, were the Porto Ricans (the persons born in the Island and residing therein) Spanish subjects at the date of the filing of said action in the Provisional Court, March 29th, 1900, almost one year after the ratification of the Treaty of Peace? Alvarez Nava, it is alleged, is a subject of the King of Spain, not a Porto Rican. Presumably, he is a native of the Peninsula. If there was no diversity of citizenship, then is it to be concluded that the subjects of the King of Spain and the Porto Ricans, that is, the persons born in the Island and residing therein at that date, were of the same nationality or citizenship as those who were born in the Peninsula and preserved their allegiance to Spain? That is not so. This Court has already, in the case of Gonzalez vs. Williams, 192 U. S. 1, so declared.

"By the constitution of the Spanish Monarchy and the Spanish Civil Code, in force in Porto Rico when the Treaty was proclaimed, persons born in Spanish territory were declared to be Spaniards, but Porto Ricans, who were not natives of the Peninsula, remaining in Porto Rico, could not, according to the terms of the treaty, elect to retain their allegiance to Spain. By the cession their allegiance became due to the United States, which was in possession and had assumed the Government, and they became entitled to its protection. The nationality of the Island became American, instead of Spanish, and by the treaty, Peninsulars not deciding to preserve their allegiance to Spain were to be held to have renounced it and to have adopted the nationality of the territory in which they may reside."

Paragraph X, already quoted, of the General Order No. 88, creating the Provisional Court and defining its jurisdiction, provided that Porto Ricans could be parties to civil actions. It also provided that the Court had jurisdiction in civil cases in which the parties were foreigners, citizens of another State, District, or Territory of the United States. Porto Rico, being since the date of the ratification of the Treaty an American territory, *de facto* and *de jure*, as has been held by this Court in the case of the Roman Catholic Church

of Porto Rico vs. the Municipality of Ponce (210 U. S. 296) and Spain being by virtue of the same Treaty a foreign country with reference to Porto Rico, it follows that there was diversity of citizenship between the Peninsular subjects of the King of Spain and the citizens and residents of Porto Rico after the Treaty, which gave jurisdiction to the Provisional Court to determine their controversies, in accordance with the General Order creating it.

III. The summons was properly served on Santiago.

It is averred that the Provisional Court had no jurisdiction to try said cause in the manner in which it was tried, in absolute disregard of the laws of Porto Rico and the procedure in force at that time. But no specific violation of the laws of Procedure in force in Porto Rico at the time said cause was prosecuted is charged in the complaint, except the one relating to the manner of serving the summons on defendant therein, José E. Santiago. It is stated that a summons was issued to Santiago, but was never personally or in any other manner legally served on him, although the record shows that a copy of said summons was delivered to the wife of Santiago, at his residence in Aibonito.

We maintain that the manner in which said summons was served was not contrary to the law in force at that time in the Island. Undoubtedly, there is a presumption that the Provisional Court, before rendering its decision in said cause, was satisfied that the proceedings, from the beginning, had been carried on properly and in accordance with the law. An examination of the Law of Civil Procedure of Porto Rico, in force at that time, and under the provisions of which the other insular courts prosecuted their causes, will show that the serving of the summons by delivering a copy to the wife of the defendant, at his residence, was proper and legal. Sections 266, 267 and 268 of the Law of Civil Procedure then in force in the Island since the year 1885, provided as follows:

"Section 266. When the residence of the person on whom the summons ought to be served is known, if said person is not found therein at the first attempt to find him, no matter

what may be the cause, or length of time of his absence, the summons shall be served by means of a *cedula* (copy of summons) in the same act, and without the necessity of a judicial order.

Section 267. The copy of the summons shall contain:

1. A statement of the nature and object of the action or business, and the names of the litigants.

2. Literal copy of the order to be notified.

3. The name of the person on whom the summons should be served, stating the reason why the delivery is made in this manner.

4. Statement of the hour in which the person was sought and not found in his residence; the date and the signature of the person who performed the deliverance.

Section 268. Said copy of the summons shall be delivered to the nearest relative or servant, if of more than fourteen years of age, found in the residence of the person on whom the summons ought to be served; and, if nobody is found therein, to the nearest neighbor who may be seen, etc."

In the present case, it is stated in the complaint that the wife of Santiago was delivered a copy of the summons, at his residence in Aibonito. Nothing is said as to the form of the summons, which presumably was in legal form. We aver that said service was legally performed, and that under the laws Santiago was bound to appear in said cause, and subject himself to the jurisdiction of the court in which it was prosecuted. Section 281 of the said Law of Civil Procedure provided that:

"In every class of proceedings or actions, when one litigant is in default (declarado en rebeldia) on account of his failure to appear in the proceedings after having been properly cited, no further effort to find him shall be made. All orders issued thereafter in the case and all other notifications which ought to be made to him, shall be served and executed in the Court room, except in the cases in which otherwise is provided . . ."

We infer from the preceding section that, if the manner in which the summons was served in the case we are discussing, was legal and proper, as we maintain, the subsequent proceed-

ings in the case are to be held legal and proper also. The failure of defendant to appear authorized the Court to render a judgment in default, which is as legal and valid as if he had appeared and defended himself.

IV. The present action is a collateral attack on the judgments of the Provisional Court and the U. S. District Court. Said judgments are conclusive and cannot be collaterally attacked.

We maintain that under the authorities these proceedings must fall within the classification known as collateral attack. In Van Fleet, on Collateral Attack, at page 4, the author describes a direct attack as follows:

"A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law"

and on the same page, the author quotes the following:

"A direct attack upon a judgment is by appropriate proceedings between the parties to it, seeking for sufficient cause alleged, to have it annulled, reversed, vacated or declared void."

We submit from the foregoing that all of the essential requisites of a direct attack are lacking in this action. It is not between the parties to the original judgment nor is it an action to secure a judgment declaring the same annulled, reversed, vacated or declared void. On the contrary, these proceedings assume to attack the judgment or rather to avoid it and to ignore its force and effect by seeking the recovery of property for its satisfaction. On page 5, section 3 of the same work, in defining a collateral attack, the author says:

"Any proceedings provided by law for the purpose of avoiding or correcting a judgment, is a direct attack which will be successful upon showing the error, while an attempt to do the same thing in any other proceeding is a collateral attack which will be successful only upon the showing of want of power."

And further on the author quoting from an Oregon case, cites the following:

"An attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying the decree or enjoining its execution, is a collateral attack"

The author then continues:

"This definition assumes that a proceeding to annul or enjoin is always direct, it is direct only when pursued in the time and manner provided by law, and against one who is not a bona fide purchaser."

Under these definitions, this action against parties who are conceded to be bona fide purchasers, clearly demonstrates that it is a collateral attack. After discussing the rights of parties in cases of collateral attack and referring to cases in which the jurisdiction of the court entering the judgment is determined to exist, the author, at page 29, states the general rule as follows:

"Rule on collateral attack. Jurisdiction existing, any order or judgment is conclusive in respect to its own validity in a dispute concerning any right or title derived through it, or any thing done by virtue of its authority."

As to the question of the jurisdiction of the Provisional Court in the original suit and the regularity of the proceedings before that Court, we quote from the same work, at page 33, where the author says:

"When a case is presented to an assumed judicial tribunal for decision, it has first to decide that a law exists authorizing the organization of such a tribunal; second, that it has been organized; and third, that the persons present are its lawful officers. It is then ready to examine the plaintiffs' alleged cause of action, and to determine whether it has power to grant relief. All of these questions the tribunal is compelled to decide in the affirmative before it takes a single step."

And at pages 83 and 84, in treating of the same question, the author quotes the following from a Wisconsin case:

"Had the court or tribunal the power under any circumstances to make the order or perform the act? If this be an-

swered in the affirmative, then its decision upon those circumstances becomes final and conclusive, until reversed by a direct proceeding for that purpose."

And in paragraph 62 on the same page, quoting from the Supreme Court of California, the author says:

"The first point decided by any court, although it may not be in its terms, is that the court has jurisdiction, otherwise it would not proceed to determine the rights of the parties."

And from a Rhode Island case, the following:

"Where jurisdiction depends upon the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact."

In this case some point is attempted to be made as to the proper citizenship of the parties to the action in the Provisional Court, but under the foregoing quotations that question must have been passed upon by the original Court, and could only be raised thereafter by a direct attack upon the judgment. The same author, in the same page, quotes from an Indiana case:

"The assumption of authority is an assertion of jurisdiction without any formal statement of the facts essential to give jurisdiction."

"Where a court of general jurisdiction assumes jurisdiction the existence of all facts necessary to confer jurisdiction are presumed to exist."

Then the author continues:

"So in Alabama it is said that action of the court implies the previous ascertainment of the preliminary jurisdictional fact and that its decision on those facts cannot be called in question collaterally."

And immediately following, the author says:

"Judicial action is an adjudication not only of the facts actually determined, but equally so of all precedent matters which should have been determined."

"A judgment by default bars the parties as conclusively collaterally as though they had framed issues and had a trial and been defeated. The assumption of jurisdiction and the exercise of authority is a decision upon the question of notice without any formal entry declaring the notice sufficient."

We are aware that there are authorities which will probably be quoted to the Court in this connection by opposing counsel, which use the general language that void judgments may be disregarded, and that they do not constitute a bar in any proceedings to which they relate, and that they may be attacked either directlly or collaterally. But an investigation of the authorities discloses that in the cases where such general language is used, the void character of the judgment must have been definitely established, either by a direct attack upon it, or in case of a collateral attack, it must be upon a question which involves the inherent jurisdiction of the court which entertained the original case, and cannot refer to those matters of procedure which under the authorities which we have quoted are conclusively presumed to have been decided by the court and correctly decided by virtue of the mere fact of the court having acted in the premises. Thus we assume that the questions of the diversity of citizenship, the issuance of proper summons and its service, and other matters necessary to be passed upon in order to enter the judgment which was entered by the Provisional Court, are conclusively presumed to have been correctly determined by the Provisional Court in order to enable it to enter the judgments in the original case.

V. The binding force of the res adjudicata.

It appears from the complaint that no steps of any kind have ever been taken by plaintiffs herein, being defendants in the suit in the Provisional Court, to appeal from, reverse, set aside or modify the judgment of that Court. In 1903 suits were brought in the U. S. District Court by plaintiff Santiago to recover from these various defendants the said various pieces of real property, which are the subjects of the actions herein. In the case filed against defendants Juan Pons Colon and Amador Pons Colon, for a portion of the properties, a trial was had to a jury, and the U. S. District Court, upon the consideration of the evidence offered in said cause by peremptory instructions directed the jury to return a verdict in favor of the said defendants, which was accordingly done, and judgment on said verdict was duly entered in said action.

No effort to reverse, set aside or modify said judgment has been made. As to the balance of the said causes in ejectment, so instituted as aforesaid, the same appear from the records of the Court to have been dismissed.

The matters and things complained of in the present action are *res adjudicata*. Also, the matters and things which were discussed in the action brought by Santiago against defendants Juan Pons Colon and Amador Pons Colon, in the United States District Court for Porto Rico, are *res adjudicata*. And, therefore the plaintiffs cannot, under the laws of Porto Rico, bring another action against the same parties or their successors, for the same cause and under the same capacity as in the former two actions.

Section 59 of the Law of Evidence on Civil Proceedings, passed by the Legislative Assembly of Porto Rico, March, 1905, and which was in force at the time this action was brought, reads:

"The effect of a judgment or final order in an action or special proceeding before a court or judge in Porto Rico, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person;

2. In other cases, the judgment or order is, in respect to the matters directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing, under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

Sections 1218 and 1219 of the Civil Code of Porto Rico, are as follows:

Section 1218.—Presumptions established by law exempt those favored thereby from producing any further proof.

Section 1219.—Presumptions established by law may be destroyed by proof to the contrary, except in the cases in which it is expressly prohibited.

Only a judgment obtained in a suit for revision shall be effective against the presumption of the *res adjudicata*

In order that the presumption of the *res adjudicata* may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes and persons of the litigants, and their capacity as such. . . .

It is considered that there is identity of the persons in all cases in which the litigants in the second case are successors in interest (causa habientes) to those who were parties in the first suit, etc."

The above quoted sections of the Civil Code, which has been in force in the Island since July, 1902, when the Legislative Assembly modified the old Spanish Civil Code, promulgated in 1889, correspond with sections 1251 and 1252 of the latter Code. The principle established in said sections had been maintained in the old civil laws of Spain, hundreds of years older than the Civil Code.

In a decision of the Supreme Court of Spain, dated May 13, 1884, which was published in the official Gazette of Madrid on the 15th of September of the same year, it was held:

That "the question stated, debated, and decided in a former suit cannot be brought again, without ignoring the force and strength of the *res adjudicata*, as provided in Law 19, Title 22, Partida 2nd, and the jurisprudence established by the Courts."

In another decision of said Supreme Court of Spain, dated June 1st, 1886, published in the Gaceta de Madrid, on the 21st of August of that year, the Court said:

"In accordance with Laws 13 and 19, Title 22, Partida 3rd, and the doctrine sustained, accordingly, by the Supreme Court, the decisions which contradict, modify or alter what has already been decided in a judgment which is final and firm (sentencia pasada en autoridad de cosa juzgada) is null and void."

And in another decision of said Tribunal, dated November 18th, 1903, published in the Gaceta de Madrid, December 4th next, it was stated:

"That as has been held by the jurisprudence of this Supreme Court, and reiterated in fulfilment of what was provided in section 1252 of the Civil Code (which corresponds with section 1219 of the Porto Rican Code) there is the presumption of *res adjudicata* whenever between the litigants in the former and present suits there exists the judicial solidarity caused by both parties exercising the action for the same object, on the same grounds, and supporting their pretensions with allegations which make identical the condition of the parties, and when the expected result in relation to the cause of action is also identical, although, as in the present case, it is attempted to establish some shadow of a difference in the circumstances of the personality of the defendant. . . ."

2. Defendants herein, as third parties, have their titles fully protected since the date of their registration. Although the judgment of the Provisional Court, and the sale of the properties by the Marshal of the United States District Court to Antonio Alvarez Nava be declared null and void, however, the titles of these defendants cannot be affected by such declaration.

These defendants had no intervention whatever in the proceedings before the Provisional Court; they were not parties to, nor had any intervention in the judicial sale effected by the Marshal of the United States District Court to Mr. Alvarez Nava. No allegation to that effect is made in the complaint herein. They are, therefore, what the Mortgage Law in force in Porto Rico designates as third parties. Section 27 of said Law reads:

"For the purposes of this law, he shall be considered a third party who had no intervention in the act or contract registered."

The sale made by the Marshal to Alvarez Nava was necessarily registered. It is stated in the complaint that the purchases made by these defendants were registered. They

could not have been if the prior sale to Nava had not been so registered.

Now, we maintain that under the law, the defendants, after registering their purchases, had their titles fully protected, and said titles cannot be invalidated or nullified. Section 33 of the Mortgage Law establishes the general rule that the mere fact of the registration does not give validity to acts or contracts which are *per se* null and void. It reads as follows:

Section 33. The registration does not give validity to acts or contracts that are null and void, in accordance with the laws.

To that general rule, however, there are exceptions, and we allege that the defendants are protected by the exception contained in Section 34 of the said Mortgage Law, which reads:

Section 34. Notwithstanding the provisions of the foregoing section (33) the acts or contracts which are executed by a person who, as shown by the Registry, appears to be with capacity or right to so execute the same, shall not be invalidated or nullified by reason of a prior title not registered, or by virtue of causes which are not clearly shown in the Registry.

We claim that this section absolutely protects the titles of these defendants against any declaration of invalidity. There was nothing in the Registry showing that the right of Mr. Alvarez Nava to execute the transfer to Pons Nogueras was impaired, denied, or doubted. There was nothing in the Registry against his capacity to convey property to others. There was nothing in the Registry against the right of the Marshal of the U. S. District Court to convey the property to Mr. Nava, the successful bidder at the judicial sale. Nothing was shown in the Registry against the proceedings carried on in the Provisional Court, which culminated in said judicial sale. Besides, there was nothing in the Registry to show to subsequent purchasers of the properties that the right of the Marshal of the Court, or of Mr. Alvarez Nava to make the transfers, had been nullified. The title in favor of Mr. Nava appeared as perfectly safe. These defendants, on their examination of the books of the Registry, which every prudent purchaser is expected to make, in order to know the title of the

property which he is to acquire, could find nothing in those books which might indicate to them that, if they should buy, their titles might some day be nullified. The complaint fails to mention anything to the contrary.

There is another exception, in favor of third parties, established by section 36 of the said Mortgage Law:

Section 36. Actions for the rescission and resolution of contracts shall not be successful as against third parties who have registered the titles of their respective rights and interests in accordance with this law.

Section 38 enumerates a series of cases in which third parties are also protected:

Section 38. In accordance with the provisions of section 36, there shall not be annulled nor rescinded, to the prejudice of third parties who have registered their titles, acts or contracts by reason of the following causes:

1. By the revocation of donations in cases permitted by the law, except that in which the donee fails to fulfill the conditions stated in the Registry.

2. By cause of legal resolution of sales, or by reason of the *derecho de tanteo* in the emphyteusis (right or privilege to pay the same rent or pension, as priorly fixed).

3. By reason of failure in the payment of the whole or part of the price of the thing sold, if it does not appear from the registration that a delay in the payment was agreed upon.

4. By reason of the double sale of one thing, when any of them has not been registered.

5. On account of lesion; in the cases 1st, and 2nd of section 1291 of the Civil Code. (Corresponding with article 1258 of the present Code.)

6. On account of alienation in fraud of creditors, excluding those excepted to in the preceding section.

7. On account of any other actions which the general or special legislation grant to certain persons to rescind contracts by virtue of causes which do not appear in the registration.

In any case in which the said actions cannot be brought as against third persons, in accordance with this section, *a personal action may be brought to recover damages against the person who caused the same.*

The Mortgage Law of Porto Rico, in its present form, has been in force since 1893. In 1880 the present system for the Registration of Real Property titles was established and the Mortgage Law, regulating its functions, was promulgated in the Island. Said law was revised and modified in 1893, but the fundamental principles of the system which it regulates are equal to those which inspired the older law of 1880. Under its terms, the Registry is open to examination by every person. The books in which the inscriptions concerning the titles are contained, may be seen and freely studied by any person who asks permission from the Registrar to do so. The only restriction is that such examination should be made within the office and under the inspection of the Registry officers. It is a necessity, in Porto Rico, for every prospective purchaser of real property, or for every prospective lender of money who is offered a real right on real property as guarantee, to go personally, or send his lawyer or notary to the Registry to make a careful examination of the inscriptions concerning the property which is to be sold or given as guarantee. That is the only office where he can be properly and legally informed of the condition and state of the property. One of the most eminent Spanish Jurists, Felipe Sanchez Roman, in his work "Estudios de Derecho Civil," volume 3rd, page 886, defines the institution of the Registry of Real Property as it exists in Spain and in Porto Rico, as follows:

"A public office in which is shown the true condition or state of real property, by the expression of all the titles transferring its ownership and real rights affecting the same, and every modification of the capacity of the persons, with reference to the free disposition of their property.

"The capital principle which has presided over its creation is that of publicity, by virtue of which the person who acquires the ownership or other real right in real estate, can only be injured or affected by other prior legal acts relative to said property, in so far as the latter had been made to appear in the Registry.

"To let the true condition of real estate be known, showing in a public and solemn manner the history of its transfers and modifications; to establish on solid bases territorial credit; to avoid frauds in the alienations of, and the creations of, liens on real property; and, lastly, to give, not only to the persons who intervene in the transfer or modification of the property,

but to the entire community, a firm guarantee of the effectiveness of their rights: such are the aims of this institution ''

And, commenting on sections 33 and 34, the same author says in the Vol. 3rd, pages 923 and 925 of the mentioned work:

''Through these sections of the law, the legislator aspires to solve a conflict which may often arise between the essential principle of every juridical act—its validity or nullity—and the formal aspect of its inscription in the Registry, in so far as the consequences of the one and the other, with respect to subsequent purchasers who have registered their acquisitions are concerned.

''The legislator was moved by the influence of two conflicting juridical principles, of equal importance. On the one hand, the rigor of juridical essences, represented by the maxims '*nemo dat quod non habet,*' or '*resoluto jure dantis resolvitur jus accipientis*' which are expressive of the respect due to prior rights. On the other hand, the effects of the registration, the consequences of the principle of publicity of the Registry, the necessity of establishing territorial credit, and the just requirement, lastly, that one purchaser, trusting what is shown in the Registry, be not injured in his rights by rights, causes or motives of which he could not legally have notice, because they were not registered. To declare the first tendency prevailing, would be equal to make the ends of the Registry system impossible of realization; to accept exclusively the second tendency would be to sacrifice the essence, and have the property live on the basis of the written and artificial organization of the inscriptions in the Registry. For these reasons, section 34 of the law represents one formula of harmony between the two conflicting terms. . . .''

To close this part of our argument, we will quote from a decision rendered by the ''Direcion General de los Registros y del Notariado,'' the superior office under whose inspection the Registration system works in Spain, dated January 26, 1900, and published in the Official Gazette of Madrid, February 27 of the same year. The resolutions of said office, which are all published in the Official Gazette, so that all persons concerned may be guided by their doctrine, in matters concerning the Registration system, are followed by the courts, as are the decisions of the Supreme Court:

''Although certain sales of real properties made by the State were declared null and void in a decision of the Tri-

bunal de lo Contencioso Administrativo (a Court of claims against the State) the Registrar cannot cancel, by virtue of such decision the inscriptions of acts and contracts transferring the ownership of the same properties, made in favor of third parties."

3. The remedy sought by plaintiffs is improper and cannot be granted.

The remedy which plaintiffs seek in their complaint as against these defendants, cannot be granted. They pray for judgment for the title and possession of the properties and for damages and costs. They entitle their action as an action for the recovery of real estate, or an "acción revivindicatoria." We maintain that plaintiffs have no right to bring an action of this kind, under the laws of Porto Rico, and that the only action they can bring under the circumstances is one to obtain the nullification of the proceedings in the Provisional Court and the subsequent sale by the Marshal to Mr. Alvarez Nava. And such an action cannot be brought against these defendants, who had no intervention nor took any part in these proceedings and sale.

It is obvious that the present action is not an action for the recovery of real estate, or an acción revivindicatoria, as the law of Porto Rico defines it. Such class of actions can only be brought by the owner of the property to recover it from a person who detains it without title. Under section 355 of the Civil Code, the owner has a right to bring an action for the recovery of his property against the tenant or possessor thereof. But there is no other article or section in said Code or in any other law of Porto Rico authorizing an action against a person who is not merely a possessor or a tenant, but has his title of ownership recorded in the Registry of Property. In our preceding argument we have endeavored to show that under such circumstances no Court would be justified in annulling a title registered by a third person.

The action of revindication can only be brought by the owner of the property, who has his title perfectly established. In the present case, the complaint states that plaintiffs have no title now, that the title is legally in the name of defendants. And the laws of Porto Rico, and the jurisprudence

of the Supreme Court of Spain on this point are so clear that no doubts can be entertained.

"This action (for the recovery of property) arises from ownership, and therefore can only be brought by whomsoever has such ownership, which must be legally shown by a good title to the property, as provided by Laws 2nd and 3rd, Title XIX, Partida 3rd, and hence the doctrine accepted by the Supreme Court in accordance therewith."

Decisions of May 18, 1866, March 1, 1867, September 17, 1863, of the Supreme Court of Spain.

"It is an incontrovertible principle of law that in actions for reivindicacion the plaintiff should prove the ownership of the thing sued for."

Decisions of November 23, 1865, April 5, 1867, and October 15, 1868, of the Supreme Court of Spain.

The following decision not only sustains the principle that this class of actions can only be brought by the owner of the property, but it fully covers our case:

"The action of revindication which may be brought by the owner of a thing is direct and efficacious against any possessor of the thing *who detains it without title; but it is not, nor can it be established with success when the possessor has a title more or less good unless prior to the bringing of this action another action be brought, which, in conformity with law, is adequate to destroy it.*" Decision of the Supreme Court of Spain, December 19, 1864.

"The action for recovery can never prevail without the actor having first been successful in another action for the nullity of the title by virtue of which the defendants are in possession." Decision of February 1st, 1887, Gaceta de Madrid, June 8, of same year.

As against the impropriety of plaintiffs praying for damages, in addition to what has been said before in opposition to qualifying this action as an action for recovery of property, we may add that under the provisions of the Civil Code of Porto Rico, even in case the plaintiffs be entitled to recover the title to these properties, they cannot recover any damages from the defendants. The complaints fail to show or allege any wrongful acts committed by them. They are not charged with bad faith in holding these lands. There is not one single allegation tending to show any interference of

these defendants in the proceedings of the Provisional Court and judicial sale. These defendants are, therefore, under the law, possessors in good faith. Section 436 of the Civil Code of Porto Rico, reads:

A bona fide possessor is deemed to be a person who is not aware that there exists in his title or the manner of acquiring it, any flaw invalidating the same.

Section 437 of the same Code reads:

Good faith is always presumed, and any person averring bad faith on the part of the possessor, is bound to prove the same.

In the present action, as we have stated, no charge of bad faith is made. The presumption of bona fide possessors, therefore, stands in favor of defendants. If that is so, they cannot be adjudged to pay any damages to plaintiffs. They cannot be responsible for lost crops.

Section 453 of the Code reads:

A possessor in good faith becomes the owner of the fruits collected, so long as the possession is not legally interrupted.
Natural and cultivated fruits are considered as collected from the time they are gathered or separated.
Civil fruits are considered as daily proceeds, and belong to the possessor in good faith in that proportion.

And Section 459 is as follows:

A possessor in good faith is not responsible for the deterioration or loss of the thing possessed, except in those cases in which it is proven that he has acted with fraudulent intent.

Under the authorities which we have quoted, we maintain that this action cannot be brought to recover the properties in question, and that no damages can be granted as against these defendants. Even if the Court should sustain the allegations of the plaintiffs, that the proceedings in the Provisional Court and the judicial sale of the properties were null and void, yet, under the laws of Porto Rico, such a declaration could not entitle to a recovery of the properties and damages from these defendants.

In conclusion, we maintain that the complaint in this case does not state a good cause of action as against the defendants: 1. Because it attempts to avoid the binding force of the *res adjudicata*. 2. It attempts to deprive bona fide purchasers (third parties) of the protection the laws give them. 3. It attempts to obtain a remedy which, under the law, cannot be granted, as against these defendants.

All of which is respectfully submitted.

Dated, New York, January 5th, 1908.

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MANUEL RODRIGUEZ-SERRA,
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